88-295

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,

Plaintiff-Appellant,

v.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; AND JOHNSON CONTROLS, INC.,

Defendants-Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hugh Hafer*
David Campbell
HAFER, PRICE, RINEHART
& SCHWERIN
2505 Third Ave. - #309
Seattle, WA 98121
(206) 728-7280

Counsel for Appellant

Counsel of Record*

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

Question Presented

Did Congress intend ERISA[1] to preempt long-standing state prevailing wage laws which include in their minimum wage calculation a specified portion payable to an apprenticeship fund?

---

[1] "ERISA" refers to the Employee Retirement Income Security Act of 1974, Public L. No. at 93-406, 66 STAT. 829 (1974) as amended (codified in scattered sections of 5, 18, 26, 29 and 31 U.S.C.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Table of Cases

STATUTES

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,

Plaintiff-Appellant,

v.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; AND JOHNSON CONTROLS, INC.

Defendants-Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 846 F.2d 1213. It is reprinted in Appendix A.

The order and judgment of the United States District Court for the Western District of Washington have not been reported. They are reprinted in Appendix B.

JURISDICTION

This action was filed in state court alleging a violation of Washington's Prevailing Wage On Public Works Statute, RCW 39.12. The case was removed to the federal District Court for the Western District of Washington on diversity of citizenship grounds. 28 U.S.C. § 1441(b) (App. A-5-7). The District Court dismissed the claim as pre-empted by ERISA. (App. B-6)

On May 18, 1988 the Ninth Circuit affirmed, holding that "to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by § 514(a)" of ERISA. (App. A-18) A Notice of Appeal was filed in the Ninth Circuit Court of Appeals on August 2, 1988. (Appendix C) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1254(2).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 514, 29 U.S.C. § 1144

Washington's Prevailing Wage on Public Works Statute, Revised Code of Washington (RCW) 39.12.

Pertinent Portions Reproduced In Appendix D.

STATEMENT OF THE CASE

Plaintiff-Appellant Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprentices Training Fund ("Fund") is a labor-management apprenticeship training trust located in Washington State. Defendants-Appellees J.A. Jones Construction Company, Bechtel Power Corporation and Johnson Controls, Inc. ("Contractors") are contractors which performed plumbing and pipefitting work on a Washington Public Power Supply System project near Richland, Washington.

Appellant Fund filed this case on July 18, 1984, in state court, alleging a violation of Washington's Prevailing Wages On Public Works Statute, RCW 39.12. This forty year old statute requires contractors working on state public works projects to pay specified minimum wages to their employees. (App. D-6, RCW § 39.12.020) Wage rates are determined by the State's Industrial Statistician pursuant to area surveys. (App. D-6, RCW § 39.12.015). The minimum wage calculation includes both direct wages, overtime, and "usual benefits". (App. D-5-6, RCW § 39.12.010) "Usual benefits" include, in part, "[t]he rate of costs to the contractor... which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program... for defraying costs of apprenticeship or other similar programs". (App. D-5-6, RCW § 39.12.010(3)(b))

The Fund alleges the Contractors failed to make apprenticeship contributions for labor performed by union craftsmen on the Richland project at the minimum levels mandated by RCW 39.12. Instead, pursuant to a collective bargaining agreement with a national union, the Contractors made contributions at levels below those required by the state minimum wage law. (App. A-5) In this action, Appellant Fund seeks the difference between contributions paid and contributions due under the state law.

The Contractors removed the case to the Federal District Court, and moved to dismiss, in part, alleging ERISA preemption. (App. A-5-7)[2] The District Court granted the motion to dismiss, holding that Section 514(a) of ERISA preempts the Washington statute insofar as it requires employer contributions to the apprenticeship plan. (App. B).

The Union appealed to the Court of Appeals for the Ninth Circuit. In a decision issued May 18, 1988, the Court affirmed the District Court's finding of ERISA preemption. (App. A-18). The Court held that (App. A-18):

> In conclusion, the clear and express purpose of Washington Revised Code § 39.12.010(3) is to govern employer contributions to employee benefit plans, including apprenticeship training plans. The statute on its face "purports to regulate" employee benefit plans. Accordingly, we hold that, to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by section 514(a).

---

[2] The contractors also sought dismissal based on alternative defenses that (1) the Fund lacks standing, and (2) the lack of an "enforceable commitment" allegedly required under state law. In light of its finding of preemption, the District Court's decision reached neither defense. (App. B-6). The Ninth Circuit rejected the contractor's standing defense, and apparently in reliance upon the well pleaded complaint rule, did not reach the contractor's second defense. (App. A-7-8, 10).

STATEMENT OF REASONS FOR PLENARY CONSIDERATION

PLENARY CONSIDERATION IS WARRANTED ON WHETHER CONGRESS INTENDED ERISA TO PREEMPT LONG-STANDING STATE MINIMUM WAGE LAWS WHICH INCLUDE EMPLOYEE BENEFIT CONTRIBUBTIONS AS A COMPONENT OF MINIMUM WAGES.

Section 514(a) of ERISA supersedes "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan..." covered by the statute. 29 U.S.C. §1144(a). This Court has not yet had occasion to consider whether in passing this provision, Congress intended to preempt state minimum wage laws, which include, in the minimum wage calculation, a portion payable to an employee benefit plan. Nor has this Court considered the issue of whether a state law which affects *only funding of welfare benefit plans* (as opposed to administration, benefits, reporting, disclosure or fiduciary responsibilities) falls within ERISA's preemptive reach.[3]

---

[3] *See eg: Allessi v. Raybestos Inc.*, 451 U.S. 504, 526 (1981) (state law barring method of computing pension benefit permitted by ERISA preempted); *Stone & Webster v. Ilsley*, 690 F.2d 323, 329 (2nd Cir. 1982), *aff'd* mem. sub nom., *Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983) (state statute requiring both contribution by employer and payment of specific benefit to beneficiary preempted); *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980) *aff'd* mem. sub nom 454 U.S. 801 (1981) (state law requiring employer establishment of specific benefit plan and contributions preempted; *Shaw v. Delta Airlines*, 463 U.S. 85, 91, 96 (1983) (state laws preempted to degree they required payment of specific benefits, not mandated by federal law, through ERISA covered plans); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985) (finding state statute requiring specific mental health care benefit "relates to" plan within meaning of ERISA); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. ____, 95 L.Ed.2d 39, 47-48 (1987) (holding state common law claims for improper processing of claim for benefits preempted); *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. ____, 95 L.Ed.2d 55, 62 (1987) (same); *Mackey v. Lanier Collection Agency*, ____ U.S. ____, 56 U.S.L.W. 4631, 4635 (1988) (general state garnishment law held not preempted).

Although the scope of ERISA preemption is broad, not all state laws which impact ERISA covered plans are preempted. As stated by this Court in *Shaw v. Delta Airlines*, 463 U.S. 85, 101, n. 2 (1983), "[s]ome state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *See e.g.: MacKey v. Lanier Collection Agency*, 57 U.S.L.W. at 4635 (state general garnishment procedures not preempted as to welfare benefit plans).

As in any preemption analysis, "the purpose of Congress is the ultimate touchstone" in analyzing ERISA preemption. *Metropolitan Life*, 471 U.S. at 747 [quoting *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978)]. At the outset, the Court should "presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life*, 471 U.S. at 740.

In some cases, the substantive scope of ERISA itself reflects a Congressional decision to leave areas open to state regulation. In *MacKey v. Lanier Collection Agency*, 56 U.S.L.W. at 4633-4636, this Court faces the issue of whether ERISA preempts application of Georgia's general garnishment procedures to welfare plan benefits. The Trust argued that garnishment necessarily "related to" the plan, because it requires trustees to participate in litigation, divert benefits to creditors, and suffer substantial administrative burdens and costs. In analyzing this issue, this Court relied on the fact that "[w]here Congress intended in ERISA to preclude a particular method of state-law enforcement of judgments, or extend anti-alienation protection to a particular type of ERISA plan, it did so expressly in the statute." 56 U.S.L.W. at 4634. Specifically, Congress chose to enact anti-alienation provisions for pension plan benefits, but not for welfare plan benefits. 56 U.S.L.W. at 4634. Congress's decision to remain silent regarding attachment of welfare plan benefits led this Court to conclude that Congress "acknowledged and

accepted" the existing state garnishment law. 56 U.S.L.W. at 4634.

The Washington statute at issue here was modeled from the federal Davis-Bacon Act, 40 U.S.C. §276 and long predates ERISA. Its purpose, like the purpose of its federal counterpart, is to "provide protection to local craftsmen who lose work because contractors engage in the practice of recruiting labor from distant cheap labor sources." *Southeastern Washington Building Trades Council v. Department of Labor & Industries*, 91 Wn.2d 41, 45 (1978). *See also: United States v. Binghamton Construction*, 347 U.S. 171, 176-78 (1954) (identifying same purpose for federal Davis-Bacon Act).

Not surprisingly, Washington's statute includes fringe benefits in its calculation of minimum wages. (App. D-5-6, RCW 39.12.010). As stated in *California Hospital Assoc. v. Hennings*, 770 F.2d 856, 860, (9th Cir. 1985) *cert. den.* 106 S.Ct. 3273 (1986) after World War II "such benefits became a means of compensating workers in lieu of increased wages." To exclude benefits from the minimum wage calculation would effectively require that minimum wages be set at substandard levels, thereby directly defeating the legislature's goal.

The Ninth Circuit's decision to hold Washington's minimum wage statute preempted has far-reaching implications. The Court's rationale broadly prohibits states from formulating minimum wages in a fashion requiring employers to bear the costs of any fringe benefit programs. (App. A-12-14). The same reasoning has now been extended to bar states from requiring non-union contractors working for a state to bear the cost of a state-sanctioned apprenticeship program. *See: Hydrostorage Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718, 726 (N.D. Cal. 1988) *appeal pending* (holding California's Labor Code Section 1777.5 preempted by ERISA insofar as it requires non-union contractor to pay costs of apprenticeship program).

Twenty-two states have public works-prevailing wage statutes similar or identical to Washington's.[4] These statutes cover state sponsored public works projects throughout the nation. The broad implications of the Ninth Circuit's decision, standing alone, warrant plenary consideration.

Moreover, there is, at a minimum, a serious question as to whether Congress intended to preempt state minimum wage laws. That the states have a fundamental interest in assuring that minimum wages and adequate apprenticeship programs be maintained on projects they fund can hardly be doubted. This Court has emphasized that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the state." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. ____, 96 L.E.2d 1, 17 (1987). It would be odd indeed if Congress in enacting ERISA, a statute designed to protect workers, intended to invalidate long-standing minimum wage laws which had heretofor served as one of the state's principal weapons in protecting workers.

Moreover, here, as in *MacKey*, the structure of the statute itself suggests that Congress chose not to bar state regulation of funding of welfare benefit plans. As stated in *Metropolitan Life*, 471 U.S. at 732:

---

[4] Alaska Stat. §36.05.010; Arkansas Stat. Ann. §22-9-308; Cal. Labor Code, §§1771, 1773; Del. Code Ann. Tit. 29, §6912; Fl. Stat. Ann. §235.32; Haw. Rev. Stat. §104; Ill. Ann. Stat. Ch. 48, §§3952-3953; Me. Rev. Stat. Ann. Titl 26, §§1303, 1304(9); Md. State Finance & Procurement Code Ann. §§12-301, 304; Mich. Stat. Ann. §17.256(2); Minn. Stat. Ann. §§177.41, 177.42(6); Mo. Ann. Stat. §290.230; Neb. Rev. Stat. §73-102; N.J. Stat. Ann. §34:11-56; N.Y. Labor Laws §220; Ohio Stat. §4115.05; Ok. Stat. §196.3; Penn. Stat. Tit. 43, §§165(4)-(7); Tenn. Stat. §439; Vir. Stat. Art. XIV, §64; Wisconsin Stat. §103.49; Wyoming Stat. §§27-4-403, 27-4-405.

> ERISA imposes upon *pension plans* a variety of substantive requirements relating to participation, *funding* and vesting. §§ 201-306, 29 U.S.C. §§ 1051-1086. It also establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for *both pension and welfare plans*. §§ 101-111, §§ 401-414, 29 U.S.C. §§ 1021-1031, 1101-1114. It does not regulate the substantive content of welfare benefit plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). (emphasis added)

Here, as in *MacKey*, Congress's decision to regulate in the field pension plan funding, but not welfare plan funding, suggests Congress chose to leave welfare plan funding open to traditional state regulation. This statutory scheme comports with reality. Trustees for health, welfare and apprenticeship trusts ordinarily have no control over funding. Although they are responsible for establishing and administering the benefit plan through which trust assets are distributed, funding is controlled by employer-union negotiations. Hence trust agreements for such plans, unlike those for pension plans, ordinarily do *not* relate in any way to employer contributions.[5]

---

[5] For these reasons, cases holding that ERISA preempts state laws dictating payment of specific benefits are inapposite. The Ninth Circuit's reliance on *Stone and Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2nd Cir. 1982), *aff'd* memo. sub nom. *Arcudi v. Stone and Webster Engineering Corporation*, 463 U.S. 1220 (1983), does not dictate a contrary result. (App. A-14-15). *Webster* did not involve a minimum wage statute. Moreover, it dictated payment of both contributions and benefits. Hence, it is distinguishable. In any event, this Court's summary affirmance of the lower court's decision does not reflect adoption of the court's reasoning. *See: Sporhase v. Nebraska Ex Rel Douglas*, 458 U.S. 941, 949 (1982) (by summarily affirming lower court, Supreme Court "did not necessarily adopt the court's reasoning").

Here, an apprenticeship trust is at issue. The statute does not require any employer to establish an apprenticeship plan. It does not dictate how trustees expend funds collected. It does not restrict the trustees' decisions regarding the nature of benefits included in the plan. It does not dictate that claims be processed in any particular fashion. Its only effect is to require employers who choose to work on state-funded projects to pay the cost of funding an apprenticeship plan.

To hold that states may no longer require contractors who choose to work on state sponsored public works projects to pay apprenticeship fund costs is equivalent to holding that ERISA leaves nothing to the states. Plenary consideration is warranted before this Court concludes that Congress intended to deprive states of their traditional power to establish minimum wages.

DATED this ____ day of _____, 1988.

Respectfully Submitted,
Hugh Hafer
David Campbell

Counsel for Appellants

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

v.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

No. 85-3894

D.C. No. C84-1120 C

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
August 4, 1986—Seattle, Washington

Filed May 18, 1988

Before: Cecil F. Poole, William A. Norris and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Pensions/Labor

Appeal from judgment. The court affirmed holding that, to the extent the Washington prevailing wage statute requires

employers to maintain a certain level of contributions to employee benefit plans, it is preempted by ERISA section 514(a).

Appellee construction companies performed work on a state project. Appellant Local Union 598 (Local Fund) is a labor-management apprenticeship and training trust fund. It sued in state court contending that the contractors failed to make apprenticeship training contributions for labor performed by workers of the local union at the minimum level mandated by state law. Instead, the contractors made contributions to a national apprenticeship training fund at the lesser level established by a collective bargaining agreement with the national union. The Local Fund seeks the difference between the two. The contractors removed and were subsequently granted a motion to dismiss. The district ruled that the state statute, to the extent it mandates employer contributions at a particular level to employee welfare benefit plans, is preempted by section 514(a) of ERISA because the state law "relates to" and "purports to regulate" an employee benefit plan.

[1] The Local Fund at no time raised any objection to federal jurisdiction. Hence, although removal was initially improper, the jurisdictional defect was cured before judgment on the merits when the Local Fund voluntarily dropped the party whose presence prevented proper diversity jurisdiction. [2] The Washington statute requires employers on public works projects to make contributions to employee benefit plans at or above the mandated "prevailing wage" level, regardless of the level of contributions established by employment contract or collective bargaining agreement. [3] Local Fund alleges that the contractors are in violation of the statute by failing to pay the full prevailing rate of costs for apprenticeship training as required. [4] The Washington prevailing wage statute is preempted by section 514(a) because it "relates to" ERISA plans. Statutes regulating contributions to ERISA plans have consistently been held preempted. [5] The

Local Fund's argument against preemption, hinging on a "contribution/benefit" dichotomy, is unsupported by the law. [6] They further argue that state statutes regulating contributions by employers to "employee welfare benefit plans" are not preempted by ERISA because Congress did not purport to regulate the obligation to make contributions to welfare plans. ERISA's minimum standards are inapplicable to welfare plans, including apprenticeship trusts. [7] However, it is not necessary to identify a specific ERISA provision that conflicts with a challenged state law. [8] Furthermore, preemption of state laws regulating employer contributions to employee welfare plans serves the congressional purpose of "eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." [9] The Local Fund's last argument against preemption invokes the exercise of a traditional state power. [10] However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan.

COUNSEL

Hugh Hafer and David Campbell, Hafer, Price, Rinehart & Schwerin, Seattle, Washington, for the plaintiff-appellant.

Ronald F. Garrity, Thelen, Marrin, Johnson & Bridges, San Francisco, California; Frederick T. Rasmussen and Paul R. Haerle, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington; Patricia C. Williams and John C. Black, Winston & Cashatt, Spokane, Washington, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

Plaintiff, an employee welfare benefit plan, brought this action against the defendant employers alleging a violation of

Washington state's "prevailing wage" on public works statute. The Washington statute, Wash. Rev. Code ch. 39.12, requires employers on public works projects to make contributions to employee benefit plans at or above the mandated "prevailing wage" level, regardless of the level of contributions established by employment contract or collective bargaining agreement. The district court held that section 514(a) of the federal Employee Retirement Income Security Act ("ERISA") preempted the Washington statute insofar as it "relates to" an employee benefit plan. We affirm.

I

Defendants, J.A. Jones Construction Company, Bechtel Power Corporation, and Johnson Controls, Inc.,[1] are contracting companies which performed plumbing and pipefitting work on a Washington Public Power Supply System project near Richland, Washington. Plaintiff, Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprenticeship Training Fund ("Local Apprenticeship Fund"), is a labor-management apprenticeship and training trust fund.

On July 18, 1984, the Local Apprenticeship Fund brought an action in Washington state court alleging a violation of Washington's public works "prevailing wage" statute, Wash.

[1]The present status of Johnson Controls, Inc. in this litigation is somewhat unclear. The district court's order of dismissal in favor of the defendants names only Bechtel Power Corporation and J.A. Jones Construction Company. The district court's order mistakenly states that all other defendants had been dismissed with prejudice by stipulation. In fact, a third defendant, Johnson Controls, Inc., had not been so dismissed.

However, the district court's order dismissed the entire action with prejudice. The plaintiff has not contended that Johnson Controls, Inc. was not included in that dismissal. No separate issues of law or fact have been raised that pertain only to Johnson Controls, Inc. Johnson Controls, Inc. has joined with the other two defendants in appellees' briefs before this court. We assume therefore that the dismissal by the district court applies with full force against all three remaining defendants.

Rev. Code ch. 39.12. The Local Apprenticeship Fund contends that the defendant contractors failed to make apprenticeship training contributions for labor performed by workers of the local union at the minimum level mandated by the state law. Instead, the defendants made contributions to a national apprenticeship training fund at the lesser level established by a collective bargaining agreement with the national union. The Local Apprenticeship Fund seeks the difference between the contributions paid and contributions allegedly due under the state prevailing wage statute.

The defendant contractors removed the action to federal district court. After the Local Apprenticeship Fund filed an amended complaint in the district court worded identically to the state court complaint, the defendants moved to dismiss, contending that the state prevailing wage law as it applies to employee benefit plans is preempted by ERISA. The district court granted the motion to dismiss, ruling that the state statute, to the extent it mandates employer contributions at a particular level to employee welfare benefit plans, is preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a), because the state law "relates to" and "purports to regulate" an employee benefit plan. The Local Apprenticeship Fund appeals.

II

Removal is a question of federal subject matter jurisdiction reviewable de novo. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 771 (9th Cir.), *cert. denied*, 107 S. Ct. 580 (1986). The defendant contractors properly removed this action to federal district court on diversity of citizenship grounds.[2]

[2]After the defendant contractors had removed this action, the plaintiff Local Apprenticeship Fund filed an amended complaint in district court. Because this complaint was worded identically to the state court complaint which had been removed, the amendment has no effect upon our jurisdictional inquiry.

To be removable on diversity grounds, a case must exhibit complete diversity of citizenship between the plaintiffs and the defendants. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806). Furthermore, for diversity removal to be proper, none of the defendants may be a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b).

Considering the posture of this case at the time of removal, neither of these two requisites for diversity removal was met. The complaint named one defendant, Wright-Schuchart, Inc., a Washington state corporation, which was not diverse as to the Washington state plaintiff. If a state action includes non-diverse parties, it may not be removed until those parties have been dismissed. *American Car & Foundry Co. v. Kettelhake*, 236 U.S. 311 (1915); *Othman v. Globe Indem. Co.*, 759 F.2d 1458, 1463 (9th Cir. 1985), *overruled on other grounds, Bryant v. Ford Motor Co.*, 832 F.2d 1080, 1082 (9th Cir. 1987) (en banc). Moreover, this non-diverse defendant was also a citizen of the state in which the action was brought, thereby precluding removal jurisdiction by virtue of 28 U.S.C. § 1441(b). Because removability is generally determined as of the time of the petition for removal, federal jurisdiction would ordinarily be defeated in this case.

However, in *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972), the Supreme Court held that a judgment of a district court may be upheld even if there was no right to removal, if the case has been tried on the merits and the federal court would have had original jurisdiction had the case been filed in federal court in the posture it had at the time of the entry of final judgment. *See also American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16-17 (1951).

In this circuit, *Grubbs* has been made applicable not only to judgments after trials on the merits but also determinations of summary judgment motions which dispose of the merits. *See, e.g., Gould*, 790 F.2d at 773; *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983). Where the

plaintiff has made no objection to jurisdiction before judgment and the jurisdictional defect has been cured before the district court by the plaintiff's voluntary action, we see no reason not to apply *Grubbs* to judgments of dismissal on the merits.

[1] In this case, subsequent to removal, but before the judgment of dismissal, the plaintiff Local Apprenticeship Fund stipulated to the dismissal of the non-diverse defendant Wright-Schuchart, Inc. The plaintiff at no time has raised any objection to federal jurisdiction. Hence, although removal was initially improper, the jurisdictional defect was cured before judgment on the merits when the plaintiff voluntarily dropped the party whose presence prevented proper diversity jurisdiction. *See* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3723, at 319 (2d ed. 1985).

Accordingly, the district court had jurisdiction to enter judgment.

III

The plaintiff pleads sufficient facts to support its standing to claim damages under the Washington prevailing wage statute. The plaintiff's amended complaint concisely states:

> 1. Plaintiff is a labor-management apprenticeship and training trust.
>
> 2. Defendants are contractors or subcontractors who performed plumbing or pipefitting work in the Richland, Washington area for the Washington Public Power Supply System.
>
> 3. Defendants failed to pay costs of apprenticeship as required by RCW 39.12.010(3)(b) and RCW 39.12.020. Plaintiff is entitled to recover from

> Defendants the costs of apprenticeship, less any sums paid the UA-NCA Training Trust Fund. The exact amount due is not known, but will be proved at time of trial.
>
> WHEREFORE, Plaintiff prays for judgment in the amount proved to be due for costs of apprenticeship and for other relief as may be appropriate.

Under Federal Rule of Civil Procedure 8(a)(2), a plaintiff need only make "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint before us in essence makes two allegations: first, Washington requires contractors to pay apprenticeship costs; second, plaintiff is entitled to recover such costs from the defendant contractors. There is no material difference between these allegations and those in a complaint stating that plaintiff delivered services to defendant and defendant failed to pay for the services rendered. The plaintiff has standing because it seeks relief for an actual injury which is fairly traceable to the defendants' allegedly unlawful conduct and is likely to be redressed by the requested relief. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

IV

Washington Revised Code chapter 39.12 is a "prevailing wage" statute applicable to all public works projects by the state, or any county, municipality, or political subdivision. Wash. Rev. Code § 39.12.020. Persons contracting for the construction of any public work must agree to pay the prevailing wage in that locality to their employees. *Id.* § 39.12.030 - .040.

The Washington statute is patterned after the federal Davis-Bacon Act, 40 U.S.C. § 276a et seq., which applies to federal public works projects. *Southeastern Washington Bldg. & Constr. Trades Council v. Department of Labor & Indus.*, 91

Wash. 2d 41, 44, 586 P.2d 486, 488 (1978). Like the Davis-Bacon Act, the Washington prevailing wage statute is intended to "provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." 91 Wash. 2d at 45, 586 P.2d at 488.

[2] Under the Washington statute, wages paid to laborers, workmen, or mechanics by public works contractors "shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed." Wash. Rev. Code § 39.12.020. This "prevailing rate of wage" is defined as "the rate of hourly wage, usual benefits, and overtime paid in the locality" to a "majority" of those in the same occupation or trade. *Id.* § 39.12.010(1).[3]

"Usual benefits" consist of (1) "[t]he rate of contribution irrevocably made by a contractor . . . to a trustee or to a third person pursuant to a fund, plan, or program," *id.* § 39.12.010(3)(a), and (2) "[t]he rate of costs to the contractor . . . which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program . . . for defraying costs of apprenticeship or other similar programs," *id.* § 39.12.010(3)(b).

The state statute does not directly establish the prevailing rate of wage in a particular locality. An industrial statistician from the Washington Department of Labor and Industries determines what the prevailing wage is with respect to each trade and occupation based upon surveys of area wages and benefits. *See id.* § 39.12.015. The industrial statistician's cal-

[3] "In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workmen, or mechanics in the same trade or occupation shall be the prevailing rate." Wash. Rev. Code § 39.12.010(1).

culation of the prevailing wage in the area must include a component for "usual benefits" that are paid in the local area, including provision of apprenticeship training benefits.

[3] Plaintiff Local Apprenticeship Fund alleges that the defendant contractors are in violation of the Washington statute by failing to pay the full prevailing rate of costs for apprenticeship training as required pursuant to Washington Revised Code § 39.12.010(3)(b). For purposes of the well-pleaded complaint rule applicable to motions to dismiss, the defendant contractors do not contest that the Washington statute compels employers to make contributions to local employee welfare plans and establishes the level at which such contributions must be made.

V

The Employee Retirement Income Security Act ("ERISA")[4] of 1974 is a comprehensive remedial statute "designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans." *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir. 1985)(citations omitted).

The interests of employees are protected through substantive requirements imposed upon pension plans relating to participation, funding, and vesting, 29 U.S.C. §§ 1051-1086, and through uniform procedural standards for reporting, disclosure, and fiduciary responsibilities for both pension and welfare plans, 29 U.S.C. §§ 1021-1031, 1101-1114. The promotion of uniform standards and regulations of employee benefit plans is achieved through preemption, with a few exceptions, of all state laws relating to such plans. *Scott*, 754 F.2d at 1501.

[4]Pub. L. No. 93-406, 88 Stat. 829 (1974), as amended, (codified in scattered sections of 5, 18, 26, 29 & 31 U.S.C.).

Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."[5]

The Local Apprenticeship Fund is concededly an "employee benefit plan" covered by the preemption clause of section 514(a). Since the fund is established to provide "apprenticeship or other training programs," it is an "employee welfare benefit plan" within the meaning of ERISA section 3(1), 29 U.S.C. § 1002(1).

Section 514(b) excludes specified types of state laws, primarily insurance, banking, securities, and generally applicable criminal laws, from the preemption clause. 29 U.S.C. § 1144(b).[6] None of those exceptions apply in this case.

The sole focus of our analysis, then, is the effect upon Washington Revised Code chapter 39.12 of the sweeping language in section 514(a), which the Supreme Court has

---

[5]Section 514(c)(2) defines the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which *purports to regulate*, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added).

Section 514(c)(1) defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

[6]Section 514(b)(6) also excepts state insurance regulations which apply to a "multiple employer welfare arrangement." 29 U.S.C. § 1144(b)(6). The Local Apprenticeship Fund involved in this case would likely fall outside of this exception because "multiple employer welfare arrangement" is defined to exclude any plan or arrangement established pursuant to a collective bargaining agreement. *See* § 3(40)(A), 29 U.S.C. § 1002(40)(A). At any rate, the Local Apprenticeship Fund has not alleged before this court or the district court that this preemption exception applies.

described as a "virtually unique pre-emption provision." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). Preemption is a question of federal law involving statutory interpretation which we review de novo. *Nevill v. Shell Oil Co.*, 835 F.2d 209, 211 (9th Cir. 1987).

Washington's prevailing wage statute as applied in this case is preempted if it both "relate[s]" to an ERISA plan and "purport[s] to regulate, directly or indirectly" employee benefit plans. *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.), *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 107 S. Ct. 435 (1986).

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)(footnote omitted). A law "purports to regulate" a plan if it attempts "to reach in one way or another the 'terms and conditions of employee benefit plans.' " *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984)(quoting 29 U.S.C. § 1144(c)(2)). The narrower "purports to regulate" test is included within the broader "relates to" test. *Martori Bros. Distributors.*, 781 F.2d at 1359. Thus a finding that a statute "purports to regulate" an employee benefit plan necessarily includes a finding that it "relates to" such a plan.[7]

---

[7]One commentary explained the basis for the two-prong test for ERISA preemption in this manner:

> Section 514(a) preempts laws of a "State," which section 514(c)(2) defines as an instrumentality "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans . . . ." Thus, the term "State" either informs the meaning of "relate to" or imposes independent requirements of its own. In either event, a state law is not preempted unless it regulates an employee benefit plan "directly or indirectly."

Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1325 (1984) (emphasis deleted)(footnote omitted).

In *Martori Bros. Distributors*, we identified four categories of state laws which have been held preempted by section 514(a) because they "relate to" ERISA plans:

> First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

781 F.2d at 1357 (listing cases).

[4] The Washington prevailing wage statute, Wash. Rev. Code ch. 39.12, falls within the second category: laws that create funding requirements for employee benefit plans. Statutes regulating contributions to ERISA plans have consistently been held preempted. *See, e.g., Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977) (California statute regulating funding and disclosure of health care service plans preempted by ERISA), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *Stone & Webster Eng'g Corp. v. Ilsley*, 518 F. Supp. 1297, 1299-1301 (D. Conn. 1981) (Connecticut statute mandating contributions to employee benefit plans under certain circumstances held preempted by ERISA), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983).

[5] However, the Local Apprenticeship Fund contends that state laws, such as the Washington prevailing wage statute, which relate to *contributions* rather than the composition or administration of *benefits*, do not "relate to" or "purport to regulate" employee benefit plans.[8] This "contribution/

[8]The Local Apprenticeship Fund relies principally upon *Sasso v. Vachris*, 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985), for this proposi-

benefit" dichotomy, while perhaps superficially appealing, is unsupported by the law.

In *Stone & Webster Eng'g Corp. v. Ilsley*, a federal district court held that a Connecticut statute which required an

---

tion. However, the "contribution/benefit" dichotomy which the plaintiff postulates is entirely absent from the analysis in the *Sasso* decision.

In *Sasso*, the New York Court of Appeals considered whether ERISA preempted a New York statute which provided a cause of action against stockholders of closely held corporations for delinquent contributions for employee benefits. In holding the statute not preempted, the court emphasized that the New York statute was merely a supplemental remedial provision "by which plaintiffs can recover delinquent contributions already due and owing to them pursuant to the corporation's obligations under the collective bargaining and trust agreements." 66 N.Y.2d at 33, 494 N.Y.S.2d at 859, 484 N.E.2d at 1362. The court went on to explain that "the only effect of [the state statute] on employee benefit plans is to give plaintiffs a cause of action to recover payments the corporation was already obligated to provide." 66 N.Y.2d at 34, 494 N.Y.S.2d at 859, 484 N.E.2d at 1362.

By contrast, the Washington prevailing wage statute imposes an additional substantive mandate upon employers by requiring them to make contributions at a higher level not established by collective bargaining agreement or by the terms of the employee benefit plan.

Moreover, the *Sasso* decision is of doubtful validity. Two federal district courts considering a similar New York cause of action against corporate directors and officers squarely held that ERISA preempts liability shifting provisions when relied upon in a state action to collect delinquent contributions. *Trustees of Sheet Metal Workers' Int'l Ass'n Production Workers' Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 562-63 (E.D. N.Y. 1983); *Calhoon v. Bonnabel*, 560 F. Supp. 101, 109-110 (S.D. N.Y. 1982); *see also Baker v. Caravan Moving Corp.*, 561 F. Supp. 337, 342 (N.D. Ill. 1983) (Illinois wage and collection statute insofar as it requires employer contributions to employee benefit plans is preempted by ERISA). The Second Circuit approved of these district court rulings in a decision holding that state wage collection statutes are preempted insofar as they permit a cause of action against employers for delinquent benefits. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327-28 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) & *aff'd mem. sub nom. Roberts v. Burlington Indus., Inc.*, 106 S. Ct. 3267 (1986).

employer to continue payments to employee welfare funds for a former employee receiving workers' compensation due to a job related injury was preempted by ERISA. The court expressly rejected a similar argument that ERISA does not purport to establish contribution levels for plans, and thus a state statute mandating continuation of contributions did not "relate to" an employee benefit plan. 518 F. Supp. at 1300-01. The court held that the challenged Connecticut statute "fundamentally and directly alters the employer's negotiated obligations." *Id.* at 1300. As such, the statute indirectly regulated the very benefits provided under the employee benefit plan. *Id.* In affirming the district court, the Second Circuit ruled that the purpose of the Connecticut law was "to add an additional statutory requirement — the cost of which is to be borne by the employer — to a private employee benefit plan," and thus the statute was clearly preempted by ERISA. *Stone & Webster Eng'g Corp. v. Ilsley,* 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Eng'g Corp.,* 463 U.S. 1220 (1963).

This analysis applies with equal force to the Washington prevailing wage statute insofar as it mandates a particular level of contributions by employers to employee benefit plans. Employer contributions are the fuel for benefit plans, such as the plaintiff Local Apprenticeship Fund. Without employer contributions, there can be no functioning ERISA plans. A statute which mandates employer contributions to benefit plans and which effectively dictates the level at which those required contributions must be made has a most direct connection with an employee benefit plan. As the district court concluded, "[T]he rate of contribution rests at the very core of ERISA's consideration."

[6] The Local Apprenticeship Fund still contends that State statutes regulating contributions by employers to "employee welfare benefit plans," § 3(1), 29 U.S.C. § 1002(1), (as opposed to "employee pension benefit plans," § 3(2), 29 U.S.C. § 1002(2)), are not preempted by ERISA because Con-

gress did not purport to regulate the obligation to make contributions to welfare plans.[9] Although ERISA establishes minimum standards with regard to funding of pension plans, 29 U.S.C. §§ 1081-86, those provisions are inapplicable to welfare plans, including apprenticeship trusts.

[7] However, it is not necessary to identify a specific ERISA provision that conflicts with a challenged State law. *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1315-16, 1321-24 (1984). Section 514(a) "was meant to clear away all state laws bearing on benefit plans . . . [even though] many aspects of benefit plans generally, and of welfare benefit plans in particular" remain unregulated by ERISA. *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1304 (2d Cir.), *vacated in part on other grounds*, 666 F.2d 21 (2d Cir. 1981), *aff'd in part, vacated in part sub nom. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). "ERISA may not confront the 'contribution level' issue at this time, but section [514(a)] has cleared the decks for such provisions, should Congress choose to address this concern in the future." *Stone & Webster Eng'g Corp.*, 518 F. Supp. at 1301.

[8] Furthermore, preemption of state laws regulating employer contributions to employee welfare plans serves the Congressional purpose of "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974)(remarks of Sen. Williams)[10] (quoted in *Shaw*, 463 U.S. at 99). This is particu-

[9] Although the particular fund involved in this case is a welfare plan, we note that Washington Revised Code § 39.12.010(3) does not limit the term "usual benefits" included in the "prevailing rate of wage" to what would constitute "employee welfare plans" under ERISA. "Usual benefits" is also defined as including "the rate of costs . . . which may be reasonably anticipated in providing benefits . . . for . . . pensions on retirement or death." Wash. Rev. Code § 39.12.010(3)(b).

[10] *Reprinted in Subcomm. on Labor of the House Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4745 (1976).

larly important in circumstances where, as in this case, employers have entered into collective bargaining agreements with national unions to make payments into inter-state employee benefit plans. State interference with such national arrangements is foreclosed by the ERISA preemption clause.

As Senator Javits explained during the legislative debate over ERISA, "[T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required ... the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits)[11] (quoted in *Shaw*, 463 U.S. at 99-100 n.20).

Finally, the Local Fund argues that state labor laws that govern working conditions and labor costs are a traditional area of state authority, and thus should not be regarded as preempted.

[9] In order to avoid preemption, it is not sufficient that a state statute represent the exercise of a traditional state power. *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd mem.*, 106 S. Ct. 3267 (1986) & *aff'd mem. sub nom. Roberts v. Burlington Indus., Inc.*, 106 S. Ct. 3267 (1986). A purported fundamental state interest is relevant only when there is an element of uncertainty as to whether the challenged state law falls within the scope of the ERISA preemption clause. In cases of uncertainty, our analysis is guided by a rebuttable "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation." *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985).

[10] However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan. "In order to avoid being preempted, a

[11] *Reprinted in ERISA Legislative History*, at 4670 .

state law in addition to being an exercise of traditional police powers must also affect the plan 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Gilbert*, 765 F.2d at 327 (quoting *Shaw*, 463 U.S. at 100 n.21). Such assuredly is not the case here.

VI

In conclusion, the clear and express purpose of Washington Revised Code § 39.12.010(3) is to govern employer contributions to employee benefit plans, including apprenticeship training plans. The statute on its face "purports to regulate" employee benefit plans. Accordingly, we hold that, to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by section 514(a).

AFFIRMED.

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
BY BARCLAYS / ELECTROGRAPHIC—SAN FRANCISCO—(415) 588-1155

APPENDIX B

B-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCAL UNION 598, PLUMBERS AND PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICESHIP TRAIN FUND, *Plaintiff,* v. THE BABCOCK & WILCOX COMPANY, et al., *Defendants.*	CAUSE NO. C84-1120C JUDGMENT ON DECISION BY THE COURT

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED, there being no just reason for delay, defendants Bechtel Power Corporation and J.A. Jones Construction Company's motions to dismiss are GRANTED. This action is hereby DISMISSED with prejudice.

DATED this 16th day of May, 1985.

/ s /
Deputy Clerk of Court

JUDGMENT ON DECISION
BY THE COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCAL UNION 598, PLUMBERS AND PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICESHIP TRAINING FUND,

Plaintiff,

vs.

THE BABCOCK & WILCOX COMPANY; COMBUSTION ENGINEERING, INC.; FOSTER WHEELER ENERGY CORP.; GUY F. ATKINSON COMPANY; WRIGHT-SCHUCHART, INC.; JOHNSON CONTROLS, INC.; J.A. JONES CONSTRUCTION COMPANY; PETER KIEWIT SONS' COMPANY; A.J. ZINDA COMPANY; BECHTEL POWER CORPORATION; and RUST ENGINEERING COMPANY,

Defendants.

NO. C84-1120C

ORDER GRANTING DEFENDANTS BECHTEL POWER CORPORATION AND J.A. JONES CONSTRUCTION COMPANY'S MOTION TO DISMISS

THIS MATTER comes before the Court on defendants Bechtel Power Corporation and J.A. Jones Construction Company's motions to dismiss. Upon due consideration of the pleadings, affidavits, and oral argument heard the 10th day of May, 1985, and the Court being fully advised, defendants' motions are hereby GRANTED.

This case involves a dispute between certain contractors at the Washington Public Power Supply System (WPPSS) Project near Richland, Washington, and a collective apprenticeship

training fund. Plaintiff (Local Fund) is the Local Union 598 of the Plumbers & Pipefitters Industry Journeymen & Apprenticeship Training Fund. Defendants before the Court presently are Bechtel Power Corporation and J.A. Jones Construction Company. All other defendants have been dismissed with prejudice by stipulation with counsel for the plaintiff.

Local Fund seeks by this action contributions from the defendants for labor performed by the members of the Local Union 598. Defendants have contributed to a benefit plan pursuant to a collective bargaining agreement between their employer association and the International Union; however, plaintiff contends that those contributions were insufficient, being less than the amounts payable pursuant to the Washington State minimum wage on public works law, RCW 39.12 *et seq.*, which obligates employers at public works projects in this state to pay workers the "prevailing rate" for their labor. RCW 39.12.010(3)(b) is the crux of plaintiff's claims and includes the computation of the "prevailing rate":

> "The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program... for defraying costs of apprenticeship...."

According to the plaintiff, the defendant contractors hired workmen at WPPSS, but failed to pay the prevailing wage because the contractors' contributions for apprenticeship costs were paid at a lesser rate set by the agreement between the employer association and the International Union. Plaintiff therefore seeks to recover the difference between the amount paid under the collective bargaining agreement with the International Union and the amount "prevailing" in the WPPSS locality.

Defendants' argument is threefold: First, defendants argue that the contributions sought by plaintiff based upon alleged liability arising from state law cannot be recovered because the state law is pre-empted by the Federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1144(a),

"relating to" an employee benefit plan subject to ERISA regulation. Secondly, defendants seek dismissal because, pursuant to the state law, the plaintiff is without standing to bring this action. Finally, defendants contend that even if plaintiff had standing, it has failed to state a proper cause of action under the state statute.

It is undisputed that the instant plan is subject to regulation under ERISA and that ERISA expressly pre-empts state laws which relate to plans governed by ERISA. ERISA "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983) ("*Shaw*"). Both the language of the statute and its legislative history clearly show:

> "'[t]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required... the displacement of State action in the field of private employee benefit programs.'" *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482 at 487 (9th Cir. 1983) (quoting Senator Javits).

Section 514(a) of ERISA, 29 U.S.C. §1144(a), expressly pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by [ERISA]."

Thus, if RCW 39.12 "relates to" the instant benefit plan, there can simply be no question that its enforcement is pre-empted, pursuant to the Supremacy Clause of the Constitution.

While the *Shaw* opinion refrains from drawing the line in determining if a plan "relates to" ERISA, the extraordinary breadth intended by Congress in enacting section 514(a) is clearly expressed:

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* at 2900.

What might fall outside of the broad scope was also suggested by the court:

> Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan. *Cf. American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (CA2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted.)" *Id.* at 2901, n. 21.

Plaintiff contends that RCW 39.12 falls within this "peripheral" exception recognized by the Court in *Shaw*. However, this analysis is misled. The *Merry* case cited by the Supreme Court in *Shaw* and other cases applying this exception since the *Shaw* ruling have universally involved matters at the extreme in being unrelated to employee plan regulation. *Cf. Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984) (California employment discrimination statute not pre-empted) with *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (Montana age discrimination law held pre-empted).

In contrast, the subject of the state regulation now before the Court is the rate of contribution which employers must pay. This can hardly be considered tenuous, remote, or peripheral, to ERISA regulation. Rather, the rate of contribution rests at the very core of ERISA's consideration. Consequently, RCW 39.12 certainly "relates" to ERISA regulation and is pre-empted by section 514(a). *Shaw, supra.*

Plaintiff argues that because ERISA allows contribution rates to be bargained by the parties to a benefit plan, the state may impose its regulation. This argument ignores both the broad intention of ERISA's pre-emption clause and the case law which has followed its enactment. *See Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2nd Cir. 1982), *aff'd* without opinion, 103 S. Ct. 3564 (1983) (Connecticut statute requiring contributions pre-empted). Even in matters left to free bargaining between the parties, the fundamental purpose of ERISA's pre-emption includes freedom from state regulation. ERISA's pre-emption is not limited to matters expressly addressed by the statute itself. *See Shaw* at 4971.

Similarly, plaintiff's argument that ERISA does not pre-empt statutes which address "fundamental local interests" ignores the cases which have arisen subsequent to ERISA's enactment, even where matters of unquestionably significant local interests were concerned. *See, e.g., Shaw, supra; Champion International Corp., supra.* Cases arising under the National Labor Relations Act, concerning pre-emption, cited by plaintiff, are inapposite.

Thus, because plaintiff's sole cause of action seeks relief pursuant to a statute which cannot stand against ERISA's broad scope of pre-emption, this case must be dismissed. Accordingly, the Court need not address whether plaintiff would have had standing under Washington law, nor whether RCW 39.12 requires an "enforcible commitment to carry out a financially responsible plan" between the plaintiff and the defendants to allow recovery.

IT IS THEREFORE ORDERED THAT:

(1) Defendants Bechtel Power Corporation and J.A. Jones Construction Company's motions to dismiss are GRANTED; and

(2) This action is hereby DISMISSED with prejudice.

The Clerk of this Court is directed to enter Judgment in accordance with this Order and to send uncertified copies of this Order and Judgment to all counsel of record.

DATED 16th day of May, 1985.

/ s /

John C. Coughenour
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND, *Plaintiff-Appellant,* v. J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC., *Defendants-Appellees.*	NO. 85-3894

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprenticeship Training Fund, the Plaintiff-Appellant above-named, hereby appeals to the Supreme Court of the United States from the Ninth Circuit's final decision affirming the District Court's dismissal of this action entered on May 18, 1988.

This appeal is taken pursuant to Title 28, U.S.C. § 1254(2).

DATED this 1st day of August, 1988.

/ s /

Hugh Hafer
David Campbell
HAFER, PRICE, RINEHART & SCHWERIN
2505 - 3rd Avenue, Suite 309
Seattle, WA 98121
Telephone: (206) 728-7280

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND, *Plaintiff-Appellant,* v. J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC., *Defendants-Appellees.*	NO. 85-3894

CERTIFICATE OF SERVICE

Hugh Hafer states:

1. I am the attorney of record in the above-referenced named case and am a member of the Bar of this Court.

2. On August 1, 1988, I caused the original of Appellants' Notice of Appeal to the United States Supreme Court to be deposited in the United States Express Mail, postage pre-paid, addressed to:

Clerk
United States Court of Appeals
Ninth Circuit
P.O. Box 547, Room 202
Seventh & Mission Streets
San Francisco, CA 94101

and,

3. I caused one copy of the foregoing Appellants' Notice of Appeal to the United States Supreme Court, to be placed in the United States mail, postage pre-paid, addressed to:

William R. Squires, III
Davis, Wright, Todd, Reese & Jones
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(Certified Mail No. P564-949-227)

Frederick T. Rasmussen
Riddell, Williams, Bullitt & Walkinshaw
4400-1001 Fourth Avenue Plaza
Seattle, WA 98154
(Certified Mail No. P564-949-191)

William F. Hoefs
Jordan Yudeen
Ronald F. Garrity
Thelen, Marrin, Johnson & Bridges
2 Embarcadero Center
San Francisco, CA 94111
(Certified Mail No. P564-949-192)

Patricia Williams
Winston & Cashett
19th Floor, SeaFirst Financial Center
Spokane, WA 99201
(Certified Mail No. P564-949-193)

/s/
Hugh Hafer

APPENDIX D

APPENDIX D

Employee Retirement Income Security Act of 1974, Section 514 (as amended), 29 U.S.C. § 1144...

§ 11.44. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(b) Construction and application. (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a) [29 USCS § 1003(a)], which is not exempt under section 4(b) [29 USCS § 1003(b)] (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act [29 USCS § 1136].

(4) Subsection (a) shall not apply to any generally applicable criminal law of a state.

(5) (A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) —

(i) any State tax law relating to employee benefit plans, or

(ii) Any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle [29 USCS §§ 1021 et seq., 1101 et seq.], and the preceding sections of this part [29 USCS §§ 1131 et seq.] to the extent they govern matters which are governed by the provision of such parts 1 and 4 [29 USCS §§ 1021 et seq., 1101 et seq.], shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph [enacted Jan. 14, 1983]), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 [29 USCS § 1136] with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6) (A) Notwithstanding any other provision of this section —

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides —

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provision to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 [29 USCS §§ 1002*(1)*, 1003] necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i)) [29 USCS § 1056(d)(3)(B)(i)].

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 USCS §§ 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act [42 USCS §§ 1396 et seq.].

(c) **Definitions.** For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) **Alteration, amendment, modification, invalidation, impairment or supersedure of any law of the United States prohibited.** Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 [29 USCS § 1031] and 507(b) [29 USCS § 1137(b)]) or any rule or regulation issued under any such law.

Washington's Prevailing Wages On Public Works Statute, RCW 39.12 (as amended; pertinent provisions)...

39.12.010. Definitions

(1) The "prevailing rate of wage", for the intents and purposes of this chapter, shall be the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workmen, laborers or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workmen or mechanics on any public work is based on some period of time other than an hour, the hourly wage for the purposes of this chapter shall be mathematically determined by the number of hours worked in such period of time.

(2) The "locality" for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed.

(3) The "usual benefits" for the purposes of this chapter shall include the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen, laborers, and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance disability and sickness insurance, or accident insurance,

for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.

(4) An "interested party" for the purposes of this chapter shall include a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director's designee.

39.12.015. Industrial statistician to make determinations of prevailing rate

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

39.12.020. Prevailing rate to be paid on public works and under public building service maintenance contracts — Posting of statement of intent

The hourly wages to be paid to laborers, workmen or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed. For a contract in excess of ten thousand dollars, a contractor required to pay the prevailing rate of wage shall post in a location readily visible to workers at the job site: *Provided,* That on road construction, sewer line, pipeline, transmission line, street, or alley improvement projects for which no field office is needed or established, a contractor may post the prevailing rate of wage statement at the contractor's local office, gravel crushing, concrete, or asphalt batch plant as long as the

contractor provides a copy of the wage statement to any employee on request:

(1) A copy of a statement of intent to pay prevailing wages approved by the industrial statistician of the department of labor and industries under RCW 39.12.040; and

(2) The address and telephone number of the industrial statistician of the department of labor and industries where a complaint or inquiry concerning prevailing wages may be made.

This chapter shall not apply to workmen or other persons regularly employed on monthly or per diem salary by the state, or any county, municipality, or political subdivision created by its laws.

39.12.021. Prevailing rate to be paid on public works — Apprentice workmen

Apprentice workmen employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workman for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journeyman, and, therefore, shall be paid at the prevailing hourly rate for journeymen.

39.12.030. Contract specifications must state minimum hourly rate — Stipulation for payment

The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workmen or mechanics in each trade or occupation required for such public

work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a stipulation that such laborers, workmen or mechanics shall be paid not less than such specified hourly minimum rate of wage.

(3)

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY,
BECHTEL POWER CORPORATION AND
JOHNSON CONTROLS, INC.
Defendants-Appellees.

MOTION OF APPELLEE BECHTEL POWER CORPORATION TO DISMISS OR AFFIRM

PAUL R. HAERLE
(Counsel of Record)
WILLIAM F. HOEFS
JANET FRASER BENTLEY
JACK A. SCHWARTZMAN
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
Counsel for Appellee
Bechtel Power Corporation

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Does ERISA[1] preempt a state prevailing wage statute to the extent that the state statute mandates a level of contribution to ERISA-regulated employee welfare benefit plans which exceeds the level established through collective bargaining?

---

[1] "ERISA" as used herein refers to the Employee Retirement Income Security Act of 1974, Public L. No. 93-406, 88 Stat. 829 (1974) as amended. ERISA is codified within 5, 18, 26, 29 and 31 U.S.C. Relevant sections are set forth at Appendix D to Appellant's Jurisdictional Statement on Appeal from the United States Court of Appeals for the Ninth Circuit ("Jurisd. Stmt.").

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The names of the parties to this proceeding are those contained in the caption of this case. All other parties to the case have been dismissed. In addition, during the time period material to this case, Bechtel Power Corporation was one of Bechtel Group, Inc.'s wholly-owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY,
BECHTEL POWER CORPORATION AND JOHNSON CONTROLS,
INC.
Defendants-Appellees.

MOTION OF APPELLEE BECHTEL POWER CORPORATION TO DISMISS OR AFFIRM

Appellee Bechtel Power Corporation moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit below on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as to eliminate the need for further argument.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at page 2 of Appellant's Jurisdictional Statement on Appeal from the United States Court of Appeals for the Ninth Circuit ("Jurisd. Stmt.") and Appendix D thereto.

STATEMENT OF FACTS

The present appeal arises from the attempt of appellant Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund (hereinafter "the Local Fund") to compel payment of contributions by appellees J.A. Jones Construction Company, Bechtel Power Corporation ("Bechtel") and Johnson Controls, Inc. to the Local Fund at levels in excess of contribution levels established pursuant to a collective bargaining agreement between the Local 598's parent organization, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry ("UA") and the National Constructors Association ("NCA"), a voluntary, unincorporated association of national construction contractors, of which Bechtel is a member.

Pursuant to the UA-NCA collective bargaining agreement, Bechtel contributes 8¢ per hour of work by all of its plumbers and pipefitters to the UA-NCA national fund for manpower development and apprentice training, an "employee welfare benefit plan" within the definition of section 3(1) of ERISA, 29 U.S.C. § 1002(1). Jurisd. Stmt. at A-12. The Local Fund, relying on the state of Washington's prevailing wage statute for public works projects, Wash. Rev. Code § 39.12, filed suit in Washington state court, alleging that appellees failed to comply with the applicable provisions of the Washington statute by contributing an amount to the Local Fund—an amount specified in the collective bargaining agreement between the UA and the NCA—less than that required by the state statute.

The Washington prevailing wage statute calculates minimum wages for public works projects pursuant to a formula which combines wages and benefits in a single economic package. Employers covered by the statute are required by its terms to contribute a minimum amount of wages plus "the usual benefits." Wash. Rev. Code § 39.12.010(1). "The usual benefits" are determined through statistical analysis performed by a state employment commissioner. Wash. Rev. Code § 39.12.015. In the case of Bechtel's work for the Washington Public Power Supply System in Richland, Washington, the "usual benefits" calculated pursu-

ant to the state statute exceed the contribution level specified in the UA-NCA collective bargaining agreement.

The Local Fund's state court action against appellees for contributions pursuant to the state statute was removed to the United States District Court for the Western District of Washington (No. C84-1120C). Appellees moved to dismiss the Local Fund's suit on the ground that the suit was preempted by section 514(a) of ERISA, 29 U.S.C. § 1144.[2] The district court granted the motion to dismiss, stating that the Washington statute "relates to" ERISA regulation and is preempted by section 514(a). Jurisd. Stmt. at B-5. The Ninth Circuit Court of Appeals affirmed, holding that to the extent the state statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by section 514(a) of ERISA. Jurisd. Stmt. at A-18.

REASONS FOR GRANTING THE MOTION TO DISMISS OR AFFIRM

THE NINTH CIRCUIT'S DECISION IS SUPPORTED BY UNAMBIGUOUS APPLICABLE LEGAL AUTHORITY AND CLEAR CONGRESSIONAL INTENT

The precise legal issue raised by the present appeal—whether state attempts to specify levels of contribution to ERISA-regulated employee welfare benefit plans are preempted under ERISA—was decided in *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983). In *Stone & Webster*, a Connecticut statute was held preempted under ERISA because the state statute required the employer to continue to contribute to an ERISA-regulated employee welfare

---

[2] In addition to ERISA preemption, appellees alleged lack of standing and failure to state a cause of action in support of their motion to dismiss appellant's district court action. Jurisd. Stmt. at B-3-B-4. In light of its holding that appellant's action should be dismissed on ERISA preemption grounds, the district court did not reach the other two grounds urged in support of dismissal.

benefit plan on behalf of a former employee who was receiving workers compensation due to a job-related injury.

The court of appeals in *Stone & Webster* explicitly confronted the issue which apparently lies at the heart of the present appeal: whether the fact that ERISA does not expressly mandate contribution levels for employee *welfare* benefit plans[4] indicates that Congress intended that the preemptive reach of section 514(a) of ERISA would not extend to state regulation of the substantive provisions of employee welfare benefit plans. The *Stone & Webster* court rejected the distinction between pension and welfare plans proposed by appellants herein for the purpose of ERISA preemption. *Id.* at 328-330. *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 726-727 (1985). This Court summarily affirmed the Second Circuit's holding in *Stone & Webster* and, because of the identity of the legal issues presented[5], should reach the same result in the present case.

---

[4] ERISA provides substantive requirements for funding of employee *pension* benefit plans, §§ 201-306, 29 U.S.C. §§ 1051-1086, as well as administrative, reporting and disclosure requirements for both employee pension benefit plans and employee welfare benefit plans §§ 101-111, §§ 401-414, 29 U.S.C. §§ 1021-1031, 1101-1114.

[5] Appellant argues that *Stone & Webster* is distinguishable because it did not involve a minimum wage statute. Jurisd. Stmt. at 9 n.8. This distinction is a mere makeweight. Both the Connecticut statute in *Stone & Webster* and the Washington statute in the present case affect the levels of employer contribution to ERISA-regulated employee welfare benefit plans. The statute in the present case represents an even greater incursion on the terms of collective bargaining agreement because it specifies precise levels, rather than merely the duration, of contributions to such plans. The prevailing wage statute therefore presents an even more compelling case for ERISA preemption than did the statute in *Stone & Webster*.

Appellant's attempt to escape the clear holding of *Stone & Webster* is also based on a fallacious distinction between state regulation of contributions, as in the present case, and state regulation of both contributions and benefits, which was at issue in *Stone & Webster*. The Ninth Circuit disposed of this contention below, noting:

> A statute which mandates employer contributions to benefit plans and which effectively dictates the level at which those

Appellant's argument is flawed because it assumes that congressional silence regarding levels of contributions to ERISA-regulated employee welfare benefit plans necessarily confers upon the states regulatory authority with respect to the substance of such plans. In *Shaw v. Delta Airlines*, 463 U.S. 85, 98 (1983), this Court clearly held that § 514(a) of ERISA may not be interpreted to preempt only state laws dealing with subject matters explicitly covered by ERISA. The scope of ERISA preemption is much broader.

ERISA's drafters contemplated a comprehensive federal statutory scheme which would replace overlapping, inconsistent or conflicting state statutory schemes "relating to" employee benefits. To that end, section 514(a) was enacted to promote uniformity and prevent conflict in this area. *See Shaw, supra* at 99 (citing 120 Cong.Rec. 29, 933 (1974) (remarks of Sen. Williams) and 120 Cong.Rec 29, 942 (1974) (remarks of Sen. Javits)). Congress considered the interest of an exclusively federal system sufficiently important that it amended the original language of the

---

required contributions must be made has a most direct connection with an employee benefit plan. (Appendix to Jurisd. Stmt. at A-15).

Appellant nevertheless attempts to distinguish *Stone & Webster* by urging the contribution/benefit distinction once again without addressing the Ninth Circuit's dispositive holding and rationale on this issue. (*See* Jurisd. Stmt. at 9 n.8.)

Appellant's final ground for rejecting *Stone & Webster*—that the Supreme Court summarily affirmed the Second Circuit's holding—is even more spurious. This Court's summary affirmance in *Stone & Webster* hardly leaves undecided an important question of federal law. While summary affirmance does not bind this Court to the reasoning of the court of appeals, the *Stone & Webster* holding, when read along with other leading cases of this Court, (*see* footnote 7, below), demonstrates that the Washington prevailing wage statute runs afoul of well-settled principles of ERISA preemption as enunciated and accepted by this Court. This Court should not sanction appellant's attempt to fabricate controversy in this clearly-delineated area of ERISA preemption.

bill, broadening the preemption language to include all state laws which "relate to" ERISA plans.[6]

This Court has uniformly interpreted § 514(a) to preempt explicit substantive regulation of ERISA plans.[7] Such attempts at state regulation of employee *welfare* benefit plans have regularly been held preempted by federal courts.[8] Appellant fails to point to

---

[6] A law "relates to" an ERISA-regulated employee benefit plan "if it has a connection with or reference to such a plan." *Shaw, supra*, 463 U.S. at 96-97. Congress clearly understood the breadth of this language in framing ERISA's preemption provision, as the Ninth Circuit explained in its opinion below. *See* Jurisd. Stmt. at A-16-A-17. The statute at issue in this case establishes contribution levels for ERISA-regulated employee welfare benefit plans, and therefore clearly "relates to" such plans.

[7] This Court has consistently held that state incursions on the substantive terms of employee benefit plans are preempted by section 514(a) of ERISA. *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981) (levels of pension benefits); *Stone & Webster, supra* (continued payment of welfare plan benefits); *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem. sub nom.*, 454 U.S. 801 (1981) (mandated health benefits); *Metropolitan Life, supra* (mandated health benefits covered by section 514(a) but otherwise exempt); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. _____, 107 S.Ct. 1549 (1987) (state common law cause of action for improper processing of benefits under ERISA regulated plan). ERISA's preemption clause does not distinguish between state regulation of content of ERISA plans and state regulation of the administration of ERISA plans, preempting both. *Standard Oil, supra*; *Metropolitan Life, supra* at 746-747. Likewise, ERISA's preemption clause applies with equal force to both pension and welfare plans. *Stone & Webster, supra; Metropolitan Life, supra.*

[8] *E.g., Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987) (state law cause of action for emotional distress and bad faith refusal to make payments under health plan); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985) *aff'd mem. sub nom., Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986) (state law causes of action for severance pay from company severance pay policy); *Stone & Webster, supra*; *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718 (N.D.Cal.

any applicable authority[9] which remotely suggests that the legal question decided in *Stone & Webster* and presented by this appeal should be revisited. The insubstantial nature of the question presented militates in favor of affirmance or dismissal in the present case.

Appellant portends grave ramifications from the Ninth Circuit's holding. Perceiving a broadside attack on all prevailing

---

1988) (required contribution to apprenticeship training fund); *General Split Corp. v. Mitchell*, 523 F.Supp. 427 (D.Minn. 1980) (mandated health benefits and establishment of health insurance risk sharing plan); *St. Paul Electrical Workers Welfare Fund v. Markman*, 490 F.Supp. 931 (D.Minn 1980) (health care contributions).

[9] The recently-decided case of *Mackey v. Lanier Collections Agency*, ____ U.S. ____, 108 S.Ct. 2182 (1988) does not bring the Ninth Circuit's holding below into question. In *Mackey*, this Court analyzed a Georgia statutory garnishment scheme which made specific reference to ERISA plans. This Court held that the antigarnishment provision of the statute, which made express reference to ERISA plans, was preempted under section 514(a). The garnishment statute as a whole was spared from preemption because its application against ERISA plans was found to be contemplated by ERISA's drafters. 108 S.Ct. at 2186-2189.

Appellant misconstrues the Court's analysis of congressional intent in *Mackey*. *Mackey* did not hold that state regulatory power is a necessary concomitant of Congressional abstention from substantive regulation of employee welfare benefit plans. Instead, the Court carefully reviewed the interaction between ERISA and other federal concerns. Finding that ERISA comports with an overall federal scheme which defers to state law to provide methods for collecting judgments, the Court noted that where the drafters of ERISA intended to displace existing state methods for collecting judgments, they did so expressly in section 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1). *Id.* at 2189.

Appellant can not point to a similar federal policy in the present case which compels state regulation of the substantive terms of ERISA-regulated employee welfare benefit plans. On the contrary, the federal policies favoring uniformity in regulation of the substantive terms of ERISA plans and promotion of collective bargaining distinguish the present case from *Mackey*. *Mackey* addressed a wholly different type of state regulation and implicated a separate set of policy concerns than does the Washington statute in the present case, and is thus of limited value in its resolution.

wage legislation, appellant claims that the holding below "would effectively require that minimum wages be set at substandard levels. . . ." Jurisd. Stmt. at 7. Appellant also argues that the Ninth Circuit's rationale prohibits states from formulating minimum wages "in a fashion requiring employers to bear the costs of any fringe benefit programs." *Id.*

By intending that ERISA preempt state efforts to regulate levels of contribution to ERISA plans, Congress did not destroy the power of states to regulate wages on public works projects. By shielding the benefit component of an employee's overall economic package and leaving determination of the existence and levels of employer welfare benefits to the parties, ERISA merely requires that states' prevailing wage legislation regulate base wages alone.[10] States are free to establish wage levels above the substandard levels forecasted by appellants; meanwhile, employers may freely contract to absorb the cost of employee fringe benefit programs.

Furthermore, preemption of state prevailing wage legislation which establishes levels of contribution to ERISA plans furthers two important federal policies: (1) the promotion of uniformity in regulation and administration of employee benefit plans and (2) the promotion of collective bargaining. The preemption clause of ERISA responded to Congress' concern with the effect on multistate employers of inconsistent and varying state benefit contribution requirements. *Fort Halifax Packing Co., Inc. v. Coyne,* ____ U.S. ____, 107 S.Ct. 2211, 2216 (1987); *Champion International Corp. v. Brown,* 731 F.2d 1406, 1409 (9th Cir. 1984). Moreover, ERISA preemption is consistent with the federal interest in collective bargaining between parties. *See Stone & Webster, supra* at 328.

In the absence of future federal legislation to the contrary, collective bargaining—whether at a local, regional or international level—is the exclusive means for establishing contribution levels to ERISA-regulated employee welfare benefit funds. This scheme

---

[10] A cursory review of the 22 state prevailing wage statutes cited by appellant (Jurisd. Stmt. at 8 n.4) reveals that fewer than half of the statutes cited mention "benefits."

recognizes and protects the expectations developed at the bargaining table and comports with the reality of nationwide industrial relations. Preemption in the present case accords with the unequivocal congressional mandate that control over contibution levels for employee welfare benefit plans rests with the parties, rather than the states.

CONCLUSION

Wherefore, appellee Bechtel Power Corporation respectfully submits that the decision of the Ninth Circuit below is indisputably correct and that the question upon which this case depends is so insubstantial as to not require further argument. Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the United States Court of Appeals for the Ninth Circuit.

Dated: September 15, 1988

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES
PAUL R. HAERLE
WILLIAM F. HOEFS
JANET FRASER BENTLEY
JACK A. SCHWARTZMAN
Counsel for Appellee
Bechtel Power Corporation

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

BRIEF OF JOHNSON CONTROLS, INC. IN RESPONSE TO FOUNDATION FOR FAIR CONTRACTING'S AMICUS CURIAE BRIEF

CARL E. HUEBER
(Counsel of Record)
JOHN C. BLACK
WINSTON & CASHATT
19th Floor
Seafirst Financial Center
Spokane, Washington 99201
Telephone: (509) 838-6131
Counsel for Johnson Control, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,
vs.
J.A. JONES CONSTRUCTION COMPANY;
BECHTEL POWER CORPORATION AND
JOHNSON CONTROLS, INC.
Defendants-Appellees.

BRIEF OF JOHNSON CONTROLS, INC., IN RESPONSE TO FOUNDATION FOR FAIR CONTRACTING'S AMICUS CURIAE BRIEF

Appellee Johnson Controls, Inc., submits this brief in response to the Amicus Curiae Brief of the Foundation for Fair Contracting. This brief is submitted pursuant to Rule 33 of the Rules of the Supreme Court.

STATEMENT OF FACTS

Johnson Controls, like Bechtel and J.A. Jones Construction Co., is a member of the National Constructors Association. To insure uniform obligations upon national contractors, the National Constructors Association entered into a national collective bargaining agreement with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry. The national agreement requires contractors to make contributions to the National Fund for apprenticeship training. The national fund is an "employee welfare benefit plan" within the definition of ERISA. In direct conflict with the negotiated contribution requirements, Washington's prevailing wage statute requires contributions in excess of the national levels.

ARGUMENT

Contrary to the appellant's Jurisdictional Statement, Congressional intent as it pertains to ERISA has been thoroughly defined. Likewise, the issue before this Court has also been addressed. The State's attempt to regulate contribution levels to an "ERISA" employee benefit plan "relate to" the employee benefit plan. Consequently, the issues raised by the appellant are inconsequential and do not require plenary consideration.

A. Congressional Intent As It Pertains To ERISA Is Well Settled.

On numerous occasions, this Court has addressed the Congressional intent behind ERISA. ERISA was intended to preempt the field of employee benefit plans to eliminate the threat of conflicting or inconsistent state and local regulations. **Fort Halifax**

Packing Co. vs. Coyne, 482 U.S. ___, 96 L.Ed.2d 1, 9 (1987).

Because the Congressional intent behind ERISA is clear, it is unnecessary for this Court to delve any further. State regulations which mandate specific contributions to ERISA employee benefit plans threaten to create inconsistent regulations. In fact, here, the subject statute **actually** creates a continuing obligation different from the obligations negotiated at a national level. The state statute at issue in this case is the exact type of regulation Congress intended to preempt. Since the Court has thoroughly defined the Congressional intent of ERISA's preemption provision, plenary consideration is not required.

B. **The State Law Directly Regulates The Terms Of An Employee Benefit Plan.**

Here, Washington Revised Code Chapter 39.12 "relates to" an ERISA plan. The law mandates a continuing obligation of contributions to an "ERISA" plan in direct conflict with the employer's negotiated obligations. Contributions are an inextricable part of a benefit plan. Consequently, plenary consideration is unnecessary where, as here, the State's regulation unquestionably purports to regulate a condition of an ERISA plan.

Here, the employers have undertaken a contractual commitment to systematically pay contributions including the attendant obligations which go with those contributions. The state law directly impacts the contractor's obligations. The case of **Stone & Webster Engineering Corp. v. Ilsley,** 690 F.2d 323 (2nd Cir. 1982), **aff'd mem. sub. nom. Arcudi v. Stone & Webster Engineering,** 463 U.S. 1220 (1983) speaks directly to the issue at hand. Just as RCW 39.12 regulates the

extent of contributions, the statute in **Stone & Webster** regulated the duration of contributions to an ERISA plan. Like the statute here, the statute in **Stone & Webster** required the employer to "make a contribution to the Fund for a former employee — as such, a pension benefit — which was not bargained for or agreed to in the contract between the employer and the Union." **Id.,** 690 F.2d at p. 329. Like the statute in **Stone & Webster,** the sole purpose of the present statute "is to add an additional statutory requirement — the cost of which is to be borne by the employer —to a private employee benefit plan." **Stone & Webster Engineering Corp.,** 690 F.2d 323, 329 (2nd Cir. 1982), **aff'd** 463 U.S. 1220, 103 S. Ct. 3564 (1983).

Laws requiring specific contributions **to** a plan are no different than laws requiring specific benefits **from** a plan. In **Fort Halifax Packing,** the court stated:

> . . . state laws requiring the payment of benefits also relate to an employee benefit plan if they attempt to dictate what benefits shall be paid under a plan. To hold otherwise would create the prospect that plan administration would be subject to differing requirements regarding benefit eligibility and benefit levels — precisely the type of conflict that ERISA's preemption provision was intended to prevent.

Id., 96 L.Ed.2d at p. 13.

Here, contributions and benefits are inextricably related. Without contributions, there would be no benefits. To preempt one without the other would be senseless.

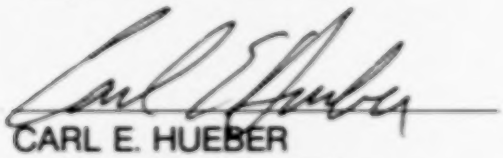
The fact that ERISA does not speak to specific contributions has no bearing on ERISA's preemptive reach. ERISA does not preempt only state laws dealing with

the subject matters covered by ERISA — reporting, disclosure, fiduciary responsibility, and the like. **Shaw v. Delta Airlines, Inc.,** 463 U.S. 85, 97, 77 L.Ed.2d 490, 501, 103 S. Ct. 2890 (1983). The preemptive reach of ERISA was meant to clear away all state laws bearing on benefit plans even though many aspects of benefit plans remain unregulated by ERISA. **Id.**

In summary, state laws regulating continued contributions to a benefit plan have a direct and continuing impact on the contractors obligations vis-a-vis that plan. This Court has thoroughly defined Congressional intent to preempt such state laws which purport to regulate a substantive requirement of the plan. Consequently, the issues raised by the present appeal are so insubstantial that the Court is requested to dismiss the present appeal or alternatively affirm the lower court's ruling.

DATES this 20th day of September, 1988.

Respectfully submitted,



CARL E. HUEBER
(Counsel of Record)
JOHN C. BLACK
WINSTON & CASHATT
Attorneys for Johnson Controls, Inc.

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY,
BECHTEL POWER CORPORATION and
JOHNSON CONTROLS, INC.
Defendants-Appellees.

BRIEF OF APPELLEE BECHTEL POWER CORPORATION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE

PAUL R. HAERLE
Counsel of Record
WILLIAM F. HOEFS
JANET FRASER BENTLEY
JACK A. SCHWARTZMAN
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
Counsel for Appellee
Bechtel Power Corporation

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes and Rules

Other Authorities

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY,
BECHTEL POWER CORPORATION and
JOHNSON CONTROLS, INC.
Defendants-Appellees.

BRIEF OF APPELLEE BECHTEL POWER CORPORATION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE

Bechtel Power Corporation ("Bechtel"), appellee in the above-titled matter, hereby opposes the Motion for Leave to File Brief Amicus Curiae and Brief of the Foundation for Fair Contracting as Amicus Curiae ("Am. Br.") filed by the Foundation for Fair Contracting ("FFC") with the Court. For the reasons stated below, Bechtel opposes the FFC's Motion for Leave to File and Amicus Curiae Brief pursuant to Rules 36.3 and 42.4 of this Court.

SUMMARY OF ARGUMENT

The Court should deny the FFC leave to file a brief *amicus curiae* because the FFC's application for leave and proposed *amicus* brief offer the Court no assistance in analyzing the legal issues presented by the appeal herein. Pursuant to the Court's standards, the FFC's submission is deficient and further consideration of it would constitute a waste of the Court's valuable judicial resources.

The FFC's brief revolves around two premises: (1) that the state statute at issue in this case, Wash.Rev.Code § 39.12.010, produces a "mere economic effect" on an ERISA-regulated[1] employee welfare benefit plan and does not regulate the terms of the plan and (2) that a "mere economic effect" of a state statute on an ERISA plan is not sufficient to compel preemption under section 514(a) of ERISA, 29 U.S.C. § 1144(a). The arguments contained in the FFC's brief are wholly encompassed within the briefs already filed with the Court by Bechtel and by appellant Local 598, Plumber & Pipefitters Industry Journymen & Apprentices Training Fund (hereinafter "appellant" or "Local 598") and are factually and legally unsupportable. Moreover, the broad speculation contained in the FFC's brief does not draw upon the purported expertise of the FFC with regard to prevailing wage legislation and simply repeats the arguments already presented to the Court. The FFC's motion for leave to file a brief *amicus curiae* should therefore be denied.

---

[1] "ERISA" as used herein refers to the Employee Retirement Income Security Act of 1974, Public L. No. 93-406, 88 Stat, 829 (1974) as amended. ERISA is codified within 5, 18, 26, 29 and 31 U.S.C. Relevant sections are set forth at Appendix D to Appellant's Jurisdictional Statement on Appeal from the United States Court of Appeals for the Ninth Circuit ("Jurisd. Stmt.").

ARGUMENT

I

LEAVE TO FILE A BRIEF AMICUS CURIAE SHOULD BE DENIED BECAUSE THE FFC'S PROPOSED BRIEF MERELY REPEATS THE ARGUMENTS ALREADY PRESENTED TO THE COURT

The FFC's brief simply restates the arguments presented by Local 598 in its Jurisdictional Statement ("Jurisd. Stmt.") and should therefore be rejected. This Court examines an *amicus curiae* brief "solely for whatever aid it provides [the Court] in analyzing the legal questions before [it]...." *Sony Corporation v. Universal City Studios*, 464 U.S. 417, 434 n.16 (1984). The stated desires of *amici* concerning the outcome of a case are not evidence and do not influence the Court's decision. *Id.*

Relying principally on *Mackey v. Lanier Collection Agency*[2] and *Fort Halifax Packing Company v. Coyne*[3], the FFC, like Local 598, attempts to cut a jagged edge into a comprehensive scheme of federal preemption under ERISA. (*See* Jurisd. Stmt. at 8-9). The FFC claims that Congressional silence regarding the terms of employee welfare benefit plans demonstrates a clear intent to render ERISA plans subject to state regulation of their terms. (Am. Br. at 10-11.) The FFC argues that preemption in the present case would defeat federal goals (Am. Br. at 4, 11) and predicts widespread negative social effects stemming from preemption of the Washington statute. (Am. Br. at 2.) Each of these arguments was presented by Local 598 in its Jurisdictional State-

---

[2] 108 S.Ct. 2182 (1988).

[3] 107 S.Ct. 2211 (1987).

ment[4] and was addressed in Bechtel's Motion to Dismiss or Affirm ("Mot. Dism.").[5]

The only substantive argument raised by the FFC which does not appear in Local 598's Jurisdictional Statement is the claim that the Washington prevailing wage statute does not regulate the terms of employee welfare benefit plans. (Am. Br. at 10-11.) This spurious[6] claim was raised by Local 598 below,[7] and was explicitly rejected by the Ninth Circuit in its opinion. (Jurisd. Stmt. at A-13.) Local 598 sounded a retreat in its Jurisdictional Statement both by failing to refute the Ninth Circuit's holding that the Washington statute *does* regulate the terms of employee welfare benefit plans and by arguing that ERISA preemption does not extend to state laws *regulating funding* of employee welfare benefit plans. (Jurisd. Stmt. at 10.)

The present case clearly represents an effort by an *amicus* to advance Local 598's position through repetition. While the FFC's interest in the matter may be valid in the abstract, its *amicus curiae* brief fails to set forth facts or questions of law which have not been, or will not adequately be, presented by the parties. *Cf.* United States Supreme Court Rule 36.3.[8] The Court should not sanction this wasteful attempt to restate arguments already before it.

---

[4] (*See* Jurisd. Stmt. at 9 (Congressional silence); Jurisd. Stmt. at 7 (federal policy); Jurisd. Stmt. at 8 (allegedly broad implications of Ninth Circuit ruling).)

[5] (*See* Mot. Dism. at 5, 8 (Congressional silence); Mot. Dism. at 7 n.9, 8 (federal policy); Mot. Dism. at 8 (implications of Ninth Circuit ruling).)

[6] The deficiencies in the FFC's preemption argument regarding the absence of explicit Congressional regulation of the terms of ERISA plans are addressed in Bechtel's Motion to Dismiss or Affirm at 5-9.

[7] (*See* Appellant's Opening Brief to the United States Court of Appeals for the Ninth Circuit (No. 85-3894) at 12-17.)

[8] Although Rule 36.3 does not expressly govern *amicus* briefs filed before review is granted, *amicus* briefs filed at any time should continue to comply with Rule 36.3. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 396.

II

THE FCC'S PROPOSED AMICUS CURIAE BRIEF RAISES ARGUMENTS WHICH ARE FACTUALLY AND LEGALLY UNSUPPORTABLE

Given the fact that the arguments contained in the FFC's proposed brief *amicus curiae* have already been briefed by both Bechtel and Local 598, Bechtel will not burden the Court with a correspondingly redundant recitation of its prior arguments. In the interest of judicial economy, Bechtel's Motion to Dismiss or Affirm is therefore incorporated by reference herein, as it responds directly to the arguments raised in the FFC's *amicus curiae* brief.

Nevertheless, a few points raised by the FFC in its proposed *amicus curiae* brief merit emphatic opposition:

1. The Washington State Statute in the Present Case Purports to Regulate the Terms of an Employee Welfare Benefit Plan and Does So in Fact

The FFC attempts an ambitious logical leap by asserting that a statute which requires specific contributions by employers to ERISA-regulated employee welfare benefit plans does not regulate, or purport to regulate, the terms of such plans. (Am. Br. at 10-11.) The FFC asks the Court to adopt this implausible assumption by applying a distinction between "mere economic effect" on ERISA plans and "regulation" of such plans. (Am. Br. at v, 2, 4, 5.) While this distinction has been validly applied to remove state statutes with remote, incidental effects on ERISA plans from the scope of ERISA preemption under section 514(a),[9] this analysis has never been extended to statutes like the

---

[9] *E.g., Mackey v. Lanier Collection Agency*, 108 S.Ct. 2182 (1988) (garnishment statute); *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984) (employment discrimination statute); *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (age discrimination statute); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979) (garnishment statute).

Washington prevailing wage statute herein which clearly create funding requirements for ERISA plans. *E.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Stone & Webster Engineering Corp. v. Ilsley*, 518 F.Supp. 1297, 1299-1301 (D.Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983); *Hewlett-Packard Co. v. Barnes*, 425 F.Supp 1294, 1297-1300 (N.D.Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). In fact, *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir.), *cert. den.*, 107 S.Ct. 435, 670 (1986), cited by the FFC in support of its position, specifically categorizes statutes which create funding requirements for ERISA plans as *within* the scope of ERISA preemption. *Id.* at 1356-57.

The FFC euphemisticlly describes Wash.Rev.Code § 39.12.010 as a statute which "encourages" the payment by employers of fringe benefits "as an incidental effect." (Am. Br. at 4.) The FFC's semantics can not escape the plain facts that (1) pursuant to the state statute payment of benefits by public works contractors is *compelled*, rather than encouraged[10], (2) levels of employer contributions to employee welfare benefit plans relate to "terms or conditions" or such plans[11], and (3) specific minimum levels of contributions are established by the state statute notwithstanding the terms set forth in collective bargaining agreements.[12] The fact that the state statute here confers economic benefits on employee welfare benefit plans is irrelevant and misleading; it does not convert a compulsory measure establishing specific contribution levels from "regulation" to "mere economic effect."

American Telephone and Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir. 1979) (garnishment statute).

[10] Wash.Rev.Code §§ 39.12.020, 39.12.021.

[11] *Martori Bros. Distributors*, 781 F.2d at 1357.

[12] The Washington statute requires employers to pay "usual benefits," Wash.Rev.Code § 39.12.010(1), which is calculated by the industrial statistician of the state department of labor and industries, Wash.Rev. Code § 39.12.015, pursuant to statutory criteria. Wash.Rev.Code § 39.12.010(3)(b).

2. The Ninth Circuit's Ruling Below Is Consistent With Well-Established ERISA Preemption Doctrine

As noted in Bechtel's Motion to Dismiss or Affirm, the Ninth Circuit's ruling below is entirely consistent with the decisions of this Court and lower federal courts on ERISA preemption.[13] The FFC, relying primarily on the *Fort Halifax* and *Mackey*[14] cases, vainly attempts to characterize the Washington state statute in the present case as a state measure which does not intrude upon matters regulated by ERISA or preserved from state regulations by ERISA. (Am. Br. at 7-9.) Closer examination of these cases reveals that they are inapplicable to the present context and fail to refute the conclusion that a statute which establishes levels of employer contributions to employee welfare benefit plans clearly intrudes on the concerns of ERISA preemption.

The FCC draws language from *Fort Halifax* without examining the critical underpinnings of the Court's holding there. In *Fort Halifax,* a Maine statute specifying levels of one-time lump sum severance payments by employers was held to be free from preemption under ERISA. The bases of the Court's ruling were that the statute merely regulates "benefits," rather than "plans," *id.* at 2215-16, that the requirement of *one-time* lump sum payments does not invoke ERISA's concern with the vulnerability of *ongoing* administrative programs to conflicting state regulations, *id.* at 2216-19, and that the severance pay requirement of the Maine statute in question is not an ERISA "plan." *Id.* at 2219-20.

Here, by contrast, the Washington state statute regulates employer contributions to ERISA-regulated employee welfare benefit plans, rather than levels of benefits. Of particular importance is the fact that the Washington statute contemplates regular, continual payments by employers pursuant to a previously-established benefit scheme, rather than a one-time lump sum payment. In *Fort Halifax,* this Court noted:

---

[13] (*See* Mot. Dism. at 6-7 n.8.)

[14] The inapplicability of *Mackey* to the present case is discussed in Bechtel's Motion to Dismiss or Affirm at 7 n.9.

> [Section 514(a) of ERISA] was prompted by recognition that employers establishing benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations. 107 S.Ct. at 2217.

In *Fort Halifax*, the Court examined the federal concerns with uniformity in the administration of ERISA plans and found them lacking in the context of a one-time lump sum mandatory severance payment. Given the ongoing nature of the obligation imposed by the Washington statute, the *Fort Halifax* rationale clearly supports the holding of the Ninth Circuit below. Thus, by advancing *Fort Halifax* in support of its position the FFC elevates result over reasoning; the mere fact that the Court in *Fort Halifax* did not find the state statute preempted does not alter the conclusion that *Fort Halifax*, by its own terms, compels preemption in the present case.[15]

3. The FFC's Prediction of Inevitable Widespread Negative Effects on State Prevailing Wage Legislation Is Unwarranted

As noted in Bechtel's Motion to Dismiss or Affirm, fewer than half of the 23 state prevailing wage statutes presently in effect even mention the word "benefit." (Mot. Dism. at 8 n.10.) While

---

[15] The FFC further confuses the issues presented on appeal by suggesting that the holding in *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718 (N.D. Cal. 1988) is a product of the Ninth Circuit's reasoning below. (Am. Br. at 4-5.) *Hydrostorage* is not presently before this Court nor are the merits of its holding at issue here. Moreover, *Hydrostorage* was decided without reliance on the Ninth Circuit's opinion below. It is therefore inappropriate for the FFC to advance *Hydrostorage* in support of its "domino theory" of preemption of prevailing wage legislation purportedly resulting from the Ninth Circuit's holding.

it would be sheer speculation for Bechtel to assume that every prevailing wage statute which is silent on its face regarding benefits will not be preempted under ERISA, it is even more precarious to suggest, as do Local 598 and the FFC, that all state prevailing wage statutes, regardless of their treatment of benefits, will be affected by the decision of the Ninth Circuit below. (*See* Jurisd. Stmt. at 8 n.4; Am. Br. at 4.) Instead, the appropriate policy analysis should focus on the federal interests which are unmistakably implicated by the present appeal: a comprehensive and exclusive regulatory scheme for employee benefit plans and the paramountcy of the collective bargaining process. (*See* Mot. Dism. at 8.) Preemption in the present case is necessary to uphold these important federal concerns.

* * *

The FFC's legal argument is flawed because it attempts to augment the few narrowly-defined areas of state regulation which are free from preemption under ERISA section 514(a), such as garnishment statutes and anti-discrimination laws, with a category of state laws which clearly impinges upon the terms of ERISA plans and the concerns of Congress in enacting ERISA. This strained construction of ERISA preemption doctrine lacks any basis whatsoever in Congressional intent, federal policy or judicial precedent. Local 598's appeal is therefore without merit and fails to present a substantial federal question to the Court.

CONCLUSION

For the reasons stated herein and in Bechtel's Motion to Dismiss or Affirm, the Motion of the FFC for Leave to File a Brief Amicus Curiae should be denied. Furthermore, Local 598's appeal should be dismissed, or in the alternative, the holding of the Ninth Circuit below should be affirmed.

Dated: September 27, 1988

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES
PAUL R. HAERLE
Counsel of Record
WILLIAM F. HOEFS
JANET FRASER BENTLEY
JACK A. SCHWARTZMAN
Counsel for Appellee
Bechtel Power Corporation

(2)

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

On Appeal
From The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE

* THOMAS E. STANTON
LAWRENCE H. KAY
BRUCE K. LEIGH
STANTON, KAY & WATSON
150 Post Street, Suite 330
San Francisco, CA 94108
(415) 788-3496
Attorneys for The Foundation for Fair Contracting

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes

Rules of the United States Supreme Court

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant.

VS.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Foundation For Fair Contracting (hereinafter, "the Foundation") hereby respectfully moves for an order granting leave to file a brief amicus curiae in support of Appellant's Jurisdictional Statement in the above-titled case pursuant to Rule 36.1 and Rule 42 of the Revised Rules of this Court. Consent of Appellees has been requested and denied. Consent of Appellant has been granted and filed with the Clerk.

In support of this motion, the Foundation states as follows:

1. The Foundation for Fair Contracting is a private, non-profit organization, existing under the laws of the State of California, whose membership consists of labor and management organizations in the construction industry throughout the 46 northern California counties. Its members include the Operating Engi-

neers, Laborers, and Cement Masons local unions and the Associated General Contractors of California, the Underground Contractors Association, and the Association of Engineering Construction Employers. The purpose of the Foundation is to monitor compliance with prevailing wage laws in California.

The problems and issues which have arisen in the above-titled case are similar to problems and issues which labor and management have faced in California, and the ruling by the Court of Appeals for the Ninth Circuit on the question whether ERISA[1] preempts Washington's prevailing wage law, RCW 39.12, insofar as it includes in its minimum wage calculation a specified portion to be payable to an employee benefit fund, threatens to have serious negative consequences for the prevailing wage law in California and for the persons affected by that law.

California's prevailing wage statute, like the Washington statute at issue here, is intended to prevent public works from depressing the level of wages in the state, to encourage employment of local labor and discourage the import of low wage labor from out of state, and to promote fairness in competition between contractors bidding for public works contracts. As an incidental effect, the statute also encourages employers on public works contracts and in the construction industry generally to provide employee fringe benefits. If the Ninth Circuit's ruling in the case here being appealed were to be left standing, the intent and benefits of California's prevailing wage law might be lost, even though it, like RCW 39.12, does not purport to regulate, directly or indirectly, the terms or conditions of any employee benefit plan which might incidentally be benefitted by it.

Moreover, if the reasoning followed by the Ninth Circuit in its decision below were to remain standing, California's statute regulating the employment of apprentices on public works projects might also be set aside. *See Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprentice ship Committee*, 685 F. Supp. 718, 726 (N.D. Cal. 1988) (enforcement of

---

[1] "ERISA" refers to the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, at 66 Stat. 829 (1974), as amended (codified in scattered sections of 5, 18, 26, 29, and 31 U.S.C.)

California Labor Code Section 1777.5—Employment of Registered Apprentices—denied in part because it requires public works contractors to make payments to an apprenticeship program).

As in the case on appeal here, so in the case cited above, legitimate state purposes stand in danger of being defeated simply because state laws which purport neither directly nor indirectly to regulate the terms or conditions of employee benefit plans nevertheless benefit such plans economically. We believe the purposes neither of ERISA's preemption provision nor of ERISA would be served by extending ERISA preemption to encompass such state laws.

2. The Foundation seeks in its brief to address the question presented by the Appellant: Did Congress intend ERISA to preempt long-standing state prevailing wage laws which include in their minimum wage calculation a specified portion payable to an apprenticeship fund?

3. The Foundation, by virtue of the experience of its members and its counsel in matters regarding both state prevailing wage laws and employee benefit plans in the construction industry in California, are particularly able to advise this Court as to the operation and effect of such laws on the construction industry and on employee benefit plans and as to the potential effect of the decision by the Ninth Circuit in this case on California law and on the interests affected by it.

For the foregoing reasons the Foundation respectfully requests that it be granted leave to file the accompanying brief as amicus curiae in support of Appellant's Jurisdictional Statement.

Dated: September 13, 1988

Respectfully submitted,

* THOMAS E. STANTON
LAWRENCE H. KAY
BRUCE K. LEIGH
Attorneys for Amicus Curiae
Foundation for Fair Contracting

* Counsel of Record

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

NOW COMES The Foundation for Fair Contracting as amicus curiae and submits this brief in support of Appellant's Jurisdictional Statement in the above-titled action. This brief of amicus curiae is submitted pursuant to Rule 36.1 of the Rules of the Supreme Court and upon the attached motion for leave to file this brief amicus curiae.

INTEREST OF AMICUS CURIAE

The interest of the Foundation for Fair Contracting is set forth in the Foundation's motion for leave to file this brief amicus curiae.

SUMMARY OF ARGUMENT

This Court should give plenary consideration to the question brought by Appellants because it raises a substantial federal question that has yet to be decided by this Court and that has far-reaching implications, and because prior decisions by this Court suggest that the decision below should be reversed.

1. As the Appellant has pointed out in its Jurisdictional Statement, p. 5, this Court has not had occasion as yet to decide either the question presented by this appeal: Did Congress intend ERISA to preempt state minimum wage laws which include, in calculating the minimum wage, a portion payable to an employee benefit plan? or the question raised by the reasoning of the Court below: Does a state law which affects only funding of welfare benefit plans (as opposed to administration, benefits, reporting, disclosure, or fiduciary responsibilities) fall within ERISA's pre-emptive reach?

2. Yet, the decision below, even if restricted in application to similar prevailing wage laws, would affect such laws in some twenty-three states and would affect not only apprenticeship plans but all employee benefit plans because employer contributions to all employee fringe benefit plans are included in calculating the rate of prevailing wages. Moreover, broadly construed, the reasoning relied upon by the Court below to preempt Washington's prevailing wage law might result in preempting not only state prevailing wage laws but any state law which, though not regulating the terms or conditions of an employee benefit plan, might benefit such plans economically or for any purpose require employers to make payments to an employee benefit plan.

3. Decisions of this Court show that the decision below should be reversed.

> (a) Decisions by this Court and by the district courts indicate that ERISA does not preempt state laws which merely affect employee benefit plans economically but which do not intrude into matters preemptively regulated by ERISA or intended by ERISA to be free from state regulation.

(b) The law at issue in this case, though economically benefitting employee benefit plans, does not intrude into matters preemptively regulated by ERISA or intended by ERISA to be free from state regulation. Contrary to the decision of the Ninth Circuit below, Washington's prevailing wage law does not create "funding requirements" as that term is used in ERISA; indeed, ERISA neither regulates nor protects from state regulation the funding of employee welfare benefit plans such as the apprenticeship plan which is plaintiff-appellant here.

(c) Since prevailing wage laws do not intrude into matters regulated by ERISA or preserved from state regulation by ERISA, preemption of such laws would not serve the purposes either of ERISA or of its preemption provision.

ARGUMENT

A. Plenary Consideration is Warranted Because this Court Has Not Yet Decided the Questions Raised by this Appeal

As Appellant has pointed out in its Jurisdictional Statement, p. 5, this Court has not yet decided either the question presented by this appeal: whether Congress intended ERISA to preempt state minimum wage laws which include, in calculating the minimum wage, a portion payable to an employee benefit plan; or the question raised by the reasoning of the Court below: whether a state law which affects only funding of welfare benefit plans (as opposed to administration, benefits, reporting, disclosure, or fiduciary responsibilities) falls within ERISA's preemptive reach.

B. Plenary Consideration is Further Warranted Because the Decision Below and the Questions Raised on Appeal Have Far-reaching Implications

The Ninth Circuit in its decision below has held that "to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by [ERISA] section 514(a)." *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213,

1221 (1988). However, said statute merely requires contractors on public works to pay laborers wages "not less than the prevailing rate of wage . . . in the same trade or occupation in the locality" (RCW 39.12.020) and defines the "prevailing rate of wage" in the locality as including the rate of employer contributions for employee fringe benefits (RCW 39.12.010).

Washington's prevailing wage statute is modeled on the federal Davis-Bacon Act, 40 U.S.C. Sec. 276, and is similar to prevailing wage laws in some twenty-two other states (Jurisdictional Statement, n. 4), including California. *See* Cal. Lab Code Secs. 1771 and 1773.1. Such laws meet legitimate, traditional state purposes which Congress itself has recognized and supported in enacting the Davis-Bacon Act. *United States v. Binghamton Construction*, 347 U.S. 171, 176-78 (1954). Such laws are intended to prevent public works from depressing the level of wages in the state, to encourage employment of local labor, to discourage the import of low wage labor from out of state, and to promote fairness in competition between contractors bidding for public works contracts. As an incidental effect, the statute also encourages employers on public works contracts and in the construction industry generally to provide employee fringe benefits. However, if the ruling of the Ninth Circuit were left standing, the intent and benefits of such laws, including California's, might be lost, even though such laws do not intrude into matters regulated by ERISA or intended by ERISA to be free from state regulation and even though the federal Davis-Bacon Act, which has similar purposes and effects, would continue to apply to the same contractors on federal public works.

Moreover, if the reasoning followed by the Ninth Circuit in its decision below were to remain standing, California's statute regulating the employment of apprentices on public works projects might also be set aside. *See Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprentice ship Committee*, 685 F. Supp. 718, 726 (N.D. Cal. 1988) (enforcement of California Labor Code Section 1777.5—Employment of Registered Apprentices—denied in part because it requires public works contractors to make payments to an apprenticeship program). If the reasoning on which the Ninth Circuit's ruling is

based were to be followed, ERISA would appear to preempt not only state prevailing wage laws but any state law which for any reason would require employers to make payments to employee benefit plans. This would mean that simply because an employee benefit plan would receive such payments, California could not require public works contractors, who benefit from the skilled work force provided by state-approved apprenticeship plans, to contribute to paying the costs of such plans.

C. Plenary Consideration is Warranted also Because Prior Decisions of this Court Suggest that the Decision Below Is in Error and Should Be Reversed

According to the holding of the Ninth Circuit in the decision below, the Washington prevailing wage statute is preempted by ERISA "to the extent [it] requires employers to maintain a certain level of contributions to employee benefit plans." *Local 598 v. J.A. Jones*, 846 F.2d at 1221. However, said statute merely requires contractors on public works to pay laborers wages "not less than the prevailing rate of wage . . . in the same trade or occupation in the locality" (RCW 39.12.020) and defines the "prevailing rate of wage" as including the rate of employer contributions for employee fringe benefits (RCW 39.12.010). In no way does that statute intrude into matters regulated by ERISA or preserved from state regulation by ERISA. In prescribing a minimum wage rate for employees on public works, it merely benefits economically those employee benefit plans which, representing the interests of employees, become rightful claimants of employer fringe benefit contributions. Therefore, the holding by the Ninth Circuit below means that prevailing wage laws such as Washington's are preempted by ERISA simply because employers, for whatever reason, may be required to make payments to employee benefit plans, thereby economically benefitting such plans and so possibly affecting the level of benefits which they may provide. *See Local 598 v. J.A. Jones*, 846 F.2d at 1219. Decisions of this Court, however, indicate that ERISA does not preempt a state minimum wage law which, in pursuit of traditional state purposes, so indirectly affects employee benefit plans.

1. Decisions of this Court and of the Circuit Courts Indicate that State Laws which Affect Employee Benefit Plans Economically but which Do Not Intrude into Matters Regulated by ERISA or Preserved from State Regulation by ERISA Are Not Preempted by ERISA

Section 514(a) of ERISA provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to ERISA. 29 U.S.C. Sec. 1144(a). This Court has construed "relate to" in broad terms, so that "'[a] law relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983). However, this Court has also advised that the scope of ERISA preemption is not unlimited. In the interest of preserving our federal system, "the exercise of federal supremacy is not lightly presumed. . . . Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). In determining the scope of federal preemption, "the purpose of Congress is the ultimate touchstone." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. ____, 95 L.Ed.2d 39, 46 (1987). Lower courts have been advised by this Court to "begin with the language employed by Congress [and to] presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). *See*, e.g., *Mackey v. Lanier Collection Agency*, 486 U.S. ____, 100 L.Ed.2d 836, 851 (1988) (state general garnishment law as applied to employee benefit plans is not preempted by ERISA); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (state garnishment law employed to enforce alimony and support orders is not preempted), *cited in Shaw v. Delta Air Lines*, 463 U.S. at 101, n. 21. Accordingly, in those decisions where this Court has sought to determine the scope of ERISA preemption, it has looked to the plain language of ERISA and its preemption provision, to the underlying purpose of ERISA's preemption provision, and to the overall objectives of ERISA itself. (*See, e.g.*,

Fort Halifax Packing Co. v. Coyne, 482 U.S. ____, 96 L.Ed.2d 1, 9 [1987]), and it has concluded that a state law which does not implicate ERISA's regulatory concerns or ERISA's concern for uniform regulation of employee benefit plans is not preempted by ERISA. *Id.* 96 L.Ed.2d at 13.

In those cases where state law undeniably has intruded into administration of employee benefit plans, this Court, following the language of ERISA, Sec. 514(a), has been able to find preemption by ERISA simply by asking whether a state law "relates to" employee benefit plans. *See*, e.g., *Allessi v. Raybestos-Manhattan*, 451 U.S. at 524; *Shaw v. Delta Air Lines*, 463 U.S. at 96; and *Pilot Life v. Dedeaux*, 95 L.Ed.2d at 47. Even then this Court warned that "[s]ome state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines*, 463 U.S. at 101, n. 21. Accordingly, in those cases where state law has been found to affect employee benefit plans but not to intrude into matters regulated by ERISA or intended by ERISA to be free from state regulation, this Court has begun to define the limits to ERISA preemption and has found that it does not apply.

In *Fort Halifax*, 96 L.Ed.2d 1, this Court denied preemption by examining the language of ERISA and its preemption provision and the underlying purposes of both. The Court found: that ERISA's preemption provision applied only to state laws that relate to employee benefit *plans* and not to laws that relate merely to employee benefits (*Id.*, 96 L.Ed.2d at 9); that the purpose of ERISA's preemption provision was to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" in order "to afford employers [or plan trustees] the advantages of a uniform set of administrative procedures governed by a single set of regulations" (*Id.*, 96 L.Ed.2d at 10 and 11); and that the scope of that preemptive concern is limited to serving the regulatory purposes of ERISA, which had been enacted to provide uniform reporting, disclosure, and fiduciary rules to govern employee benefit plans and their administration. This Court concluded that where state law implicated the concerns of neither ERISA's preemption provision nor the regulatory concerns of

ERISA itself, state law is not preempted by ERISA. *Id.* 96 L.Ed.2d at 13.

In *Mackey v. Lanier Collection Agency, supra,* this Court followed a similar procedure: to determine the scope of ERISA preemption, it examined the content and structure of ERISA itself. The Court found that Congress, in enacting ERISA, was fully aware that employee benefit plans were affected by numerous, if not innumerable, state laws and, in choosing to preemptively legislate as to only certain matters, had acknowledged and accepted prevailing state law affecting employee benefit plans as to other matters. *Id.,* 100 L.Ed.2d at 848-49. Such a conclusion agrees with the language itself of ERISA's preemption provision: state law is superseded only by "the provisions" of ERISA, not by the fact that it may affect employee benefit plans.

Decisions by the circuit courts have similarly defined the limits of ERISA preemption in terms of the regulatory content and purpose of ERISA. Paying heed to the language of ERISA, Sec. 514(c)(2), where Congress defined "State" for the purposes of preemption of state law to include any agency or subdivision thereof "which purports to *regulate, directly or indirectly, the terms and conditions of employee benefit plans*" (emphasis added), these courts have concluded that in order to fall under ERISA preemption a state law must not only relate to or affect employee benefit plans but also must purport to regulate in one way or another these terms or conditions of such plans that Congress intended ERISA to regulate or to preserve from state regulation. *See,* e.g., *Stone & Webster Engineering Corp. v. Ilsley,* 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub nom Arcudi v. Stone & Webster,* 463 U.S. 1220 (1983) ("A state law 'relates to' an employee benefit plan and is subject to preemption whenever it 'purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans"); *Rebaldo v. Cuomo,* 749 F.2d 133, 137 (2d Cir. 1984), *cert. den.,* 105 S.Ct. 2702 (1985) ("Thus, a state law must 'purport to regulate, . . . the terms and conditions of employee benefit plans' to fall within the preemption provision"); *Lane v. Goren,* 743 F.2d 1337, 1339 (9th Cir. 1984) ("before a court may find a state statute is superseded [by ERISA], . . . the state statute must attempt to reach in one way

or another the 'terms and conditions of employee benefit plans"); and *Martori Bros. Distributors v. James-Massengale,* 781 F.2d 1349, 1359 (9th Cir. 1986), *cert. den.,* 107 S.Ct. 435, 670 ("a state law must also 'purport to regulate' ERISA plans before it can be held to be preempted").

As this Court and the circuit courts have frequently observed, "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans;" and for that purpose ERISA "imposes participation, funding, and vesting requirements on pension plans" and "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare benefit plans." *Shaw v. Delta Air Lines,* 463 U.S. at 91. ERISA also provides an exclusive scheme of civil enforcement of plan rights and terms as well as of it own provisions. *Pilot Life v. Dedeaux, supra.* In addition, although ERISA does not regulate the substantive content of welfare benefit plans, ERISA's pre-emption provision has been construed to preserve such matters from state regulation in the interest of preventing conflicting or inconsistent state or local regulation of such matters, which thus have been left to collective bargaining. *Shaw v. Delta Air Lines, supra.* As a result, the Ninth Circuit in *Martori Bros. Distributors,* 781 F.2d at 1356-57, accurately concluded that ERISA preemption is limited to state laws that intrude into any of four areas, i.e., areas regulated by ERISA or intended by ERISA to be free from state regulation:

> "First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plans."

Following such reasoning, both this Court and courts below have refused to find that ERISA preempts state laws which, short of intruding into matters regulated by ERISA or preserved from state regulation by ERISA, merely affect them economically. In *Mackey v. Lanier Collection Agency,* 100 L.Ed.2d at 845, this

Court held Georgia's general garnishment statute not preempted by ERISA even though garnishment undeniably imposes administrative burdens and costs on such plans. So, too, the Second Circuit in *Rebaldo v. Cuomo*, 749 F.2d at 138, held that a New York law precluding self-insured employee benefit plans from negotiating discounted rates with hospitals is not preempted by ERISA even though it would have an economic impact on such plans. And the Ninth Circuit in *Lane v. Goren*, 743 F.2d at 1340, held that California's employment discrimination law is not preempted by ERISA even though it increases the costs of operating such plans.

2. Contrary to the Decision below, Washington's Prevailing Wage Law, though Economically Benefitting Employee Benefit Plans, Does Not Intrude into Matters Preemptively Regulated by ERISA or Intended by ERISA to Be Free from State Regulation

The Ninth Circuit in its decision below held that Washington's prevailing wage statute is preempted by ERISA because it "create[s] funding requirements for employee benefit plans." It reasoned that insofar as the statute may require employers to maintain a certain level of contributions to employee benefit plans, it must be preempted by ERISA because "[e]mployer contributions are the fuel for benefit plans," indeed, "the rate of [employer] contribution rests at the very core of ERISA's considerations." *Local 598 v. J.A. Jones*, 846 F.2d at 1218-19.

Yet, ERISA does not set "funding requirements" for employee welfare benefit plans, such as the Appellant's, at all; ERISA's "funding requirements" apply only to pension plans. ERISA, Sec. 301, 29 U.S.C. Sec. 1081. Nor, contrary to the Ninth Circuit's reasoning, does the fact that ERISA leaves employers' obligations to contribute to employee welfare benefit plans unregulated necessarily mean that Congress intended that area to remain free of state regulation. Here, as elsewhere, Congress may have intended state law to remain valid. *Compare Mackey v. Lanier Collection Agency*, 100 L.Ed.2d at 848 (state general garnishment law reaches welfare benefit plans even though Sec. 206(d)(1) exempts pension plans from the operation of such statutes). In fact, Congress has left the question of employers' funding obligations

for welfare benefit plans to collective bargaining, an area where state minimum wage laws have always remained in force. It is only reasonable to conclude, therefore, that Congress did not intend the matter to be free of state regulation but intended it to be subject to the same federal and state laws which have always regulated such matters. It is difficult to believe that Congress, which enacted ERISA to coordinate with federal labor law, would have intended that a minimum wage law which is not preempted by the National Labor Relations Act (*see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 755) should be preempted by ERISA, when the matter at issue—wages and employer fringe benefit contributions—is a matter not for ERISA regulation but for collective bargaining.

3. Since Prevailing Wage Laws Do Not Intrude into Matters Regulated by ERISA or Preserved from State Regulation by ERISA, Preemption of such Laws Would Not Serve the Purposes Either of ERISA or of Its Preemption Provision

The purpose of ERISA's preemption provision has been to eliminate the "threat of conflicting or inconsistent state and local regulation of employee benefit plans." *Fort Halifax*, 96 L.Ed.2d at 10. But there is no such threat where state law does not intrude upon matters regulated by ERISA or intended by ERISA to be left unregulated by state or local law. As in *Fort Halifax, supra*, so here, Washington's prevailing wage law implicates neither the regulatory concerns of ERISA nor the concerns of ERISA's preemption provision and therefore should not be preempted by ERISA.

Congress has left the question of employers' obligations for employee welfare benefits to collective bargaining and has not chosen to exclude state minimum wage or prevailing wage laws from affecting such bargaining. Congress has enacted federal minimum wage and prevailing wage laws and has permitted states to do likewise. This Court has recently advised that "ERISA preemption analysis 'must be guided by respect for the separate spheres of government authority preserved in our federalist system.' " and that "[i]f a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempt-

ing to address uniquely local social and economic problems." *Fort Halifax*, 96 L.Ed.2d at 16. Here Washington's prevailing wage law serves traditional state purposes which Congress itself has recognized in enacting the Davis-Bacon Act and furthers the purpose of ERISA of protecting the financial soundness of employee benefit plans without intruding into matters regulated by ERISA or intended by ERISA to be free of state regulation.

CONCLUSION

For the reasons set forth hereinabove, this Court should give plenary consideration to the question raised by Appellants.

Dated: September 13, 1988

Respectfully submitted,

* THOMAS E. STANTON
LAWRENCE H. KAY
BRUCE K. LEIGH
Attorneys for Amicus Curiae
Foundation for Fair Contracting

* Counsel of Record